Supreme Court, U.S.
FILED

09-381 SEP 12 2009

OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2009

JAMES CONSTANT

Petitioner,

v.

Superior Court of the State of California, County of San Bernardino, S-35, Case No. SCVSS 096961

Court of Appeal of the State of California, 4th District Div 2 Consolidated Cases EO44802 and EO45320

Supreme Court of California Case S173448

THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and Through the Department of Transportation, Real Party in Interest

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

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QUESTIONS PRESENTED

1. The Fifth Amendment, as incorporated to the states, requires that valuation and payment, with adjustments for rapid increases in property values and delays in payment, are made before taking of private property by government. Pursuant to its quick action laws, the State of California condemned private property without making valuation, payment and adjustments before taking private property. Do California's quick action laws deprive property owners of their 5th Amendment right for just compensation?

2. The Fourteenth Amendment requires a valid policy reason for the disparity between the State and private owner litigants. California's quick action laws allow immediate possession of private property by the State and protracted litigation burden for the property owner. Do California's quick action laws deprive property owners of their 14th Amendment right for equal treatment?

3, The Fifth Amendment, as incorporated to the states, requires that owners cannot have property taken without the opportunity to conduct pre deprivation discovery necessary for the preparation of their defense to the taking. Pursuant to its quick action laws, the State of California condemned private property without affording owners the opportunity to conduct pre deprivation discovery necessary for the preparation of their defense to the taking. Do California's quick action laws deprive property owners of their 5th Amendment right for due process?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

Petitioner James Constant, in propria persona, respectfully prays that a writ of certiorari issue to review the California Supreme Court's decision denying petitioner's Petition for Review and Motion to Dismiss Case in that court, and lower court decisions.

OPINIONS BELOW

The California Supreme Court's decision denying petitioner's Petition for Review and Motion to Dismiss Case in that court filed 7/22/09, and lower court decisions, appear in the APPENDIX to this Petition.

JURISDICTION

The California Supreme Court's decision in this matter was final on 8/22/09. This Court's jurisdiction is invoked under Title 28 USC 1257.

STATUTORY PROVISIONS INVOLVED

5th and **14th Amendments** to the United States Constitution. **Article I, section 19** of the California Constitution is set forth on page 11 of this petition. California **Code of Civil Procedure §1263.110** *et seq.*

STATEMENT OF THE CASE

This is an eminent domain action in which plaintiff The People of the State of California, acting by and through the California Department of Transportation ("State"), condemned certain real property owned by defendants James and Robert Constant[1] in a "quick take" action pursuant to **Code of Civil Procedure ("C.C.P") §1263.110.**[2] The State took possession of the property on 11/19/02 and filed a Notice of Deposit on 11/20/02. Money was deposited with the State Treasurer. As required by California's Constitution, no deposit was made in court and no prompt release of payment to appellant was made by the State. (Clerk's Transcript "CT" 748).

In 2007, the jury made an award substantially greater than the quick take deposit in 2002(CT 628). Post verdict motions were filed. The trial court denied petitioner's Motion for a New Trial and, having determined that petitioner was not qualified to testify as an expert(CT 606,611), granted the State's Motion for Judgment Notwithstanding the Verdict ("JON")CT 636) on grounds the jury did not follow Instruction **CACI 3515** awarding petitioner half the JON award "for his half interest" in the property(App 48,53), in effect, sharing the award with the State. Petitioner filed a Motion to Dismiss Case for failure to pay which was denied by the trial court (App 45).

The court of appeal reversed the judgment in Case E046012 (costs) and affirmed the judgments in consolidated Cases E044802 (merits and constitutional claims) and E045320 (constitutional

[1] Robert Constant having filed a settlement of his claim with the State before trial was dismissed from this action. App 38

[2] All further statutory references are to California's Code of Civil Procedure unless otherwise indicated

claim).(App 44). A Petition for Rehearing was denied. The California Supreme Court denied petitioner's Petition for Review and Motion to Dismiss Case without opinion(App 23,25). The courts below refused to hear petitioner's constitutional claims and made all decisions depend on state statutory provisions(App 37).

Petitioner contends the decisions below are repugnant to the California and Federal Constitutions because they condemn private property without making valuation, payment, and adjustments for rapid increases in land values before taking private property, because without a valid policy reason they create a disparity between the State and property owners (take now pay later after protracted litigation), and because they do not provide pre deprivation discovery that would enable owners to prepare their defenses to the taking.

QUESTION 1 presented is a **5th Amendment** question (taking and compensation). The **5th Amendment** requires valuation and payment before taking private property, and adjustments for rapid increases in land values and delay in payment.

There are two parts of **Cal. Const. Art. 1, §19**. The first part conforms with the **5th Amendment** and the second part authorizes "quick action" for taking private property upon deposit in court and prompt release to the owner of money determined by the court to be the probable compensation by a jury.

In the trial and appeal courts, petitioner contends that quick action is unconstitutional because it fails the **5th**

Amendment requirements and fails the prompt payment "quick action" part of **Cal. Const. Art. 1, §19**.

No Pre Deprivation Valuation And Payment

In appeal Case E044802 the trial court had determined that the taking was valid(CT 84,362) and that the date of value was 11/20/02(CT 388). There was no pre deprivation valuation(CT 143) and no payment to owners (to this date). The trial court had denied defendant's motions in Limine ("ML"). In ML 7 (CT 117 taking property without pre deprivation payment), the trial court ruled "The issues of probable compensation and deposit, and the setting of the date of valuation have been previously adjudicated and the correct amounts and dates have been set"(CT 599) and, in ML 11 (CT 143,424 taking property without pre deprivation valuation), the trial court ruled that "the validity of the take has already been adjudicated"(CT 446).

At trial, the trial court had precluded defendant's testimony and evidence ruling defendant may offer no valuation opinions as those would require expert presentation(CT 599,605,610,618).

In appeal Case E045320 the trial court had denied Appellant's Motion to Dismiss the Eminent Domain Proceeding Pursuant to **C.C.P. 1268.020(b)** and **Cal. Const. Art 1 19**, for lack of constitutional taking and lack of constitutional payment. Petitioner argued that failure to pay requires dismissing case to effectuate purpose of eminent domain law. *See* Appellant's Opening Brief at page 6 and Reply at page 25 in Case E045320. The trial court had ruled that "The Court finds that the time requirements of **C.C.P §1268.010(A)** have not been triggered by a final judgment in this matter and thus, the requisites of **C.C.P §1268.020** cannot be established". (App 45)

The California Supreme Court denied petitioner's Motion to Dismiss Case without opinion(App 23). Petitioner argued that a constitutional taking and payment were not made. (App 25).

Thus, contrary to federal law and under color of State quick action laws, the courts below affirm that pre deprivation valuation and payment are not necessary for taking private property and just compensation.

No Adjustment For Rapid Land Increase

The trial court denied appellant's motions, ML 10 (CT 136,449), ML 15 (CT 170,456) requesting adjustment for rapid increase in property value, without specifying grounds(CT 599). However,

> "at the time a court decides a case, market valuation of the property is constitutionally compelled irrespective of what the statute required" **Redevelopment Agency v. Gilmore (1985) 38 Cal.3d 790, 796-797**

At trial there was no adjustment for rapid increase in land value. "rapid land value increases between the dates of taking and trial must be compensated for in order to provide just compensation" **Kirby Forest Industries, Inc. v. United States, 467 US 1,17 (1984).**

At the end of trial in 2007, petitioner could not purchase equivalent property with the trial court's award based on a 2002 date of value.[3] "The just compensation

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[3] The 50% JNOV award about $1.50/sf based on the 2002 date of

required by the Constitution is that which constitutes a full and perfect equivalent for the property taken". **Monongahela Navigation Co. v. United States, 148 US 312, 326 (1893).**

No Adjustment For Delay in Payment

The trial court granted the State's motion to reset the date of value on 11/20/02, the date of commencement of the action on grounds "under the **Mt San Jacinto** holding, the date of probable compensation is the date of valuation"(CT 388). There was, therefore, no adjustment for delay in payment. However, a "substantial delay between valuation and payment necessitates procedure for modifying award to reflect value at time of payment", **Kirby**, *supra. Dates of value notoriously deny just compensation. See* "Government Takings and Constitutional Guarantees: When Date of Valuation Statutes Deny Just Compensation," **2003 BYU L. Rev. 265.**

No Valid Policy Reason For Unequal Treatment of Litigants

QUESTION 2 presented is a **14th Amendment** question (equal treatment). The quick take action, authorized by the "quick action" part of **Cal. Const. Art. 1, §19**, creates disparity between litigants, immediate possession of private property by the State and protracted litigation by property owners (*See* 5 year Register of Actions CT 1-83). However, there is no valid policy reason for the disparity because quick action is unnecessary.

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value falls short of the $37/sf petitioner's final demand made in 2005 before trial (CT 460) and the current 2009 property value of $20/sf by the tax assessor.

> In 1996, the California Department of Transportation (the State) determined that the 1-210 freeway would be extended through Fontana. In November 2002, the State was authorized to take one and one-half acres of a five-acre parcel owned by defendant James. App 38

Since the State has been implementing the taking of property and starting its planning process back in 1996, it is difficult to see what the valid policy reason is for sudden hurry to obtain immediate possession by "quick action" in 2002.

In the trial and appeal courts, petitioner contends that the quick action process causes a disparity and deprives him of the equal protection provision of the Constitution. *See* Appellant's Opening Brief in Case 44802 at pages 15-18,43-45,46(par. 27),47,49(par. 2); Appellant's Opening Brief in Case E045320 at page 1; Appellant's Reply Brief in consolidated Cases E044802 and E045320 at pages 1,4(par. 2),11,15-18. The trial and appeal courts refused to hear appellant's constitutional claims. App 41

No Pre Deprivation Discovery

QUESTION 3 presented is a **5th Amendment** question (due process). California requires a pre deprivation hearing, without discovery, by a State or local Board. The Board issues a Resolution of Necessity(CT 990) which allows the State to quick take private property. Owner's due process rights are violated by the Resolution of Necessity because the State or local Board denies them the opportunity

to conduct pre deprivation discovery necessary for the preparation of their defense to the taking in the trial court.

Trial courts assume a valid taking of property by a valid Resolution of Necessity and assume the postdeprivation remedy of compensation satisfies due process. Here, the trial court held that "there was no gross abuse of discretion in the County's approval of the propriety to take"(CT 84). The trial court refused to take judicial notice of evidentiary data(CT 85) and Board transcripts(CT 254)**[4],** thus denying appellant a fair hearing and the right to testify and offer evidence. The trial court denied appellant's taking(CT 104,186),(CT 110,196) and Resolution of Necessity(CT 223) motions on grounds "subject matter of this motion has already been adjudicated at prior proceedings", namely, the trial court's earlier decision, on validity of the taking, at the hearing on 6/7/04(CT 84,362). Board transcripts were held "not relevant to the issue of value"(CT 599).

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[4] *See* transcript of Board Action Item 114 Agenda 11/19/02(CT 760) cited in Appellant's Opening Brief in Case E044802 at pages 4(CT 760),5(CT 196),6(CT 760,762,763, 764),14, 21,42(par. 17).

REASONS FOR GRANTING THE WRIT

The pay first and then take protections of the California and the U. S. Constitutions are dead in California. They have been replaced by a flawed "quick action" process which takes property first and pays for it later, pennies on the dollar, after all appeals have been exhausted. Under that non neutral process, just compensation is made to depend on State statutory provisions. Seven years ago, petitioner's property was taken without just compensation ascertained by a jury, as requested, without first been paid to or into court for the petitioner and without deposit in court and prompt release to petitioner of the probable amount the jury would later award, as required by the quick action part of California's Constitution.

The issues presented by this Petition are appropriate for review by this Court pursuant to the California and Federal Constitutions to settle important questions of eminent domain law in that they decide questions of first impression of the validity of State enacted quick action eminent domain law and further involve a conflict situation, between State statutory provisions and the United States Constitution, likely to be the subject of persistent litigation in the future. California's eminent domain law is repugnant to the United States Constitution and Federal law because it makes just compensation depend on non neutral State laws.

Federal law requires disregarding State authorities and statutory provisions used by the courts below which are in conflict with and are obstacles to the accomplishment and execution of the full purposes and objectives of eminent domain law. **Edgar v. Mite Corp. 457 US 624, 631 (1982).**

The purpose of eminent domain law is more than government making a token deposit and courts affirming *pro forma* under local laws. It involves valuation and payment before taking, adjustments for rapid land increases and delay in payment, adjudication by a jury when requested, and above all it requires neutral local procedural rules to taking and compensation claims. This purpose cannot be subordinate to State authorities and statutory provisions for taking private property. California courts offer no objective criteria for distinguishing between statutes that do and do not conflict with the constitutional requirements. Here, State statutory provisions are unconstitutional because they conflict with both State and Federal constitutions.

California's quick action process has deprived petitioner of his property, and of the just compensation, due process and equal treatment provisions of the State and Federal constitutions. Under both State and Federal constitutions, the valuation and payment of private property and its payment are preliminary to its taking by eminent domain. California's quick action process is inopposit, the taking of private property is preliminary to its valuation and payment. The quick action process affords the State a means of acquiring property immediately without a valid policy reason and affords the owner the burdensome right to protracted litigation with payment withheld until all appeals have been exhausted, all under color of State authorities and statutory provisions for taking private property in violation of constitutional requirements for due process, just compensation and equal treatment of litigants.

Certiorari should be granted for the reasons that the California Supreme Court has wrongly affirmed important questions of due process, just compensation and equal treatment

under non neutral State quick action laws which are repugnant to the United States Constitution and Federal laws.

Constitutional Questions Presented Are First Impression

Under the State Constitution, a taking occurs when compensation has first been paid to, or into court for the owner. Immediate "quick action" possession is authorized upon deposit in court and prompt release to the owner of money determined by the court to be the probable compensation by a jury.

> **Article I, section 19** of the California Constitution provides: "*Private property may be taken or damaged* for public use *only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner.* The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings *upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation.[the jury will award]"* (See also, **US Const., 5th Amend**. [private property shall not be taken for public use without just compensation]. *Italics added.* **Mt San Jacinto Community College Dist. v. Superior Court (2007), 40 Cal. App. 4th. Fn 1**

Thus, in a quick take action, **Art. 1, §19** of the State Constitution requires payment preliminary to taking. Here, a constitutional taking has not occurred because no money has been *first been paid to, or into court for the owner.* Immediate possession was made without *deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation.[the jury will award].* Under the **5th Amendment**, a taking occurs when payment is made after trial. **Kirby Forest Industries Inc. v. United States (1984) 467 US 1, 17-18 (Kirby).** ("A constitutional taking occurs when the owner is finally paid after trial"). Here, no money has been paid to this date.

Under the **5th Amendment**, valuation is preliminary to actual taking.

> "The proceeding for the ascertainment of the value of the property and consequent compensation to be made, is merely an inquisition to establish a particular fact *as a preliminary to the actual taking;* and it may be prosecuted before commissioners or special boards or the courts, with or without the intervention of a jury, as the legislative power may designate" *Italics added.* **United States v. Jones, 109 U. S.513, 519 (1883).**

The Federal constitution also requires that "rapid land value increases between the dates of taking and trial must be compensated for in order to provide just compensation" and a "substantial delay between valuation and payment necessitates procedure for modifying award to reflect value at time of payment", **Kirby Forest Industries, Inc. v. United States, 467 US 1,17 (1984).**

Thus, under both State and Federal law, the valuation and payment of private property are preliminary to its taking by eminent domain, and rapid land increases and delay in valuation and payment require modifications to reflect value at time of payment. In California's quick action process, the taking of private property is preliminary to its valuation at trial and offers no rules for rapid land increases and delay in payments. The quick action process affords the State a means of acquiring property immediately and affords the owner the right to protracted litigation with payment withheld until all appeals have been exhausted, all under color of State authorities and statutory provisions for taking private property in violation of constitutional requirements for just compensation and equal treatment of litigants. **Nordlinger v. Hahn, 505 US 1 (1992)** ("equal treatment is violated absent a valid policy reason for the disparity between litigants").

Allowing just compensation to depend on State authorities and statutory provisions *ascertained by the trial court* would be unconstitutional because it gives the trial court powers to decide all issues of when a taking occurs, of vacating *just compensation ascertained by a jury* by JNOV verdict, and by withholding when payment is to be *first paid to, or into court, and prompt release to the owner of money*, all in violation of **Cal. Const. Art. 1, §19** which expressly confers these powers on a jury.

Local rules or procedures must not discriminate against the federal law or affect the availability of a federal right. **Davis v. Wechsler, 263 US 22,24 (1923).** Petitioner's just compensation cannot be made to depend the State's deposit or JNOV award based on State statutory provisions.

Seaboard Air Line Ry. v. US (1923) 261 US 299, 304. State and federal statutory provisions have been invalidated when necessary to ensure just compensation to the owner. **Kirby Forest Industries Inc. v. United States (1984) 467 US 1, 17 (Kirby)**

Objections to Appeal Court's Opinion

The Appeal Court's Opinion ("O") states that "The State deposited probable compensation as required for a quick take action" App 38. However, there was no deposit in court and prompt release to petitioner as required by **Cal. Const. Art. 1, §19**. The O also states that "Constant was awarded one-half of the verdict for one-half ownership of property" App 38**[5]**. However, just compensation is for taking not ownership of property.

The O cites **Aetna Life and Casualty Co. v. City of Los Angeles (1985) 170 Cal. App 3d 865,877** as approving the constitutionality of a jury instruction **CACI 3515**. App 41. However, the **Aetna** case at 876 clearly states "Our decision with regard to plaintiffs' recovery in inverse condemnation makes it unnecessary for us to discuss the propriety of the judgment notwithstanding the verdict . . ."**[6]**

Moreover

> "the only type of evidence which can be used to establish value is the opinion of qualified experts

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[5] QUESTION 4 When one owner settles before trial, does awarding one-half of the verdict for one-half ownership of property deprive the non settling owner's **5th Amendment** right for just compensation?

[6] QUESTION 5 Does a trial court's granting JNOV reducing the amount of the jury award deprive a property owner's **5th Amendment** right for just compensation?

> *and property owners*" *Italics added.* **Aetna 170 Cal. App. 3d 865, 877.**

Here, petitioner's testimony and evidence *as a property owner* were precluded. The trial court held that petitioner "may offer no valuation opinions as those would require expert presentation". (CT 606, 611). The O held that "the only expert's opinion on the value of the property" was the State's expert. App 38.[7] Denying a party the right to testify or to offer evidence is reversible *per se*. **Caldwell v. Caldwell 204 Cal.App.2d 819,821 (1962).**

The O states that "As to his claim that the quick-take statutory scheme violates the state and federal Constitution requirements that just compensation must be paid, these arguments were rejected in **Mt San Jacinto Community College Dist. v. Superior Court (2007), 40 Cal. App. 4th 659-661".** App 41. And, the O states that

> "The California Supreme Court has approved the quick-take process. Constant has failed to show that he will not receive just compensation due to the provisions of section 1268.010. As such, he cannot show that his constitutional rights are implicated.". App 43.

Thus, the O equates quick action **section 1268.010** *with the federal constitution.* In fact, the **Mt San Jacinto** case discussed two issues *under the quick action part of*

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[7] QUESTION 6 Does a trial court's precluding an owner from testifying and presenting evidence deprive the property owner of **5th Amendment** rights for due process and just compensation?

California's Constitution, neither of which reads on the federal questions which the courts below refused to hear.

> First, does a statutory property valuation date that occurs at the time the condemner deposits the probable compensation *in court under section 1263.110, et seq.* deny the property owner just compensation *under the California Constitution* when litigation in the eminent domain action is not expected to end until several years after the deposit is made? Second, is the owner' statutory waiver of rights after withdrawing the funds an unconstitutional condition on the statutorily required "release" of the deposit? *Italics added.*
>
> We conclude that the statutory date of valuation at the time the probable compensation is deposited is constitutional *[under the California Constitution]*, and that the requirement of a waiver of claims and defenses for receipt of deposited probable compensation is constitutional. *Parenthesis text added.* **Mt San Jacinto**, *supra.*

In short, the O attempts to incorporate California's flawed quick-take law into the **5th** and **14th Amendments**. Moreover, it does not discuss the constitutionality of (1) the propriety of the JNOV**[8]**, (2) the trial court's ruling that petitioner was not qualified to testify as an expert, and (3) the trial court's apportionment of the JNOV award between petitioner and the State.

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[8] Petitioner argued that JNOV is error because it fails the federal requirements set forth in **Reeves v. Sanders Plumbing Prods. Inc. 530 US 133 (2000)**

Federal Sovereignty is Implicated

The **5th** and **14th Amendments** are the strongest legal bulwarks of the Constitution. They prohibit government from condemning private property without making valuation, payment and adjustments before taking property and, absent valid policy reasons, they prohibit government from creating disparity between litigants, immediate possession of private property by government and protracted litigation by property owners delaying payment until all appeals are exhausted.

In the popular mind, as shown daily by letters to the editor of local newspapers, citizens believe that the Constitution guarantees their freedoms. But, State courts are most preoccupied with local rules and procedures. Petitioner need not illustrate the problem of State courts refusing to hear federal constitutional claims. As shown by Appendices, the State courts below refused to hear petitioner's constitutional claims under **Calif. Const. Art 1, §19, US Const. 5th** and **14th Amendments.** However, State courts must not decide merely according to the laws and Constitution of the State, but according to the "supreme law of the land". **Testa v. Katt, 330 US 386 (1947).** They are bound to give effect to the Federal laws and to disregard State law when there is a conflict. **Cooper v. Aaron, 358 US 1 (1958).** It violates the Supremacy Clause for a State court to refuse to hear a category of Federal claims when the court entertains State law actions of a similar nature. **Howlett v Rose, 496 US 356 (1990).**

Indeed., when state courts have looked under the hood at the constitutional aspects of the quick action procedure they have found related issues diminishing federal

sovereignty. In **Lemon v. Mississippi Transportation Commission, (Miss. 1999) 1999 WL 161328,** observing that "it is . . . [textbook] law that our state and federal constitutions prohibit laws which permit deprivation of property without prior notice or hearing," the state Supreme Court determined that even though the quick-take statute does provide for pre deprivation notice and a postdeprivation hearing, the ultimate issue is whether the postdeprivation remedy is enough to satisfy due process. It concluded that "in situations where the State feasibly can provide a pre deprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation . . . remedy to compensate for the taking". In **Sapero v Baltimore, (Md 2007) 920 A.2d 1061** and **Baltimore v Valsamakis (Md 2007) 916 A.2d 324** the courts held that the owner's due process rights were violated by the quick take procedure because it denied them the opportunity to conduct discovery necessary for the preparation for their defense of the taking. The courts also noticed that the city had been taking its sweet time in implementing the taking of property and starting its planning process back in 1982. Since it proceeded in baronial leisure, it was difficult to see what the sudden hurry to obtain immediate possession was about once the condemnation was filed. The courts thought that behaving in this fashion suggested that the city was using the truncated quick-take procedure as a litigation tactic to gain an unfair advantage over the owners.

The **Lemon** case ruled that the owner could not have property taken without the opportunity for a pre deprivation hearing being guaranteed. The **Valsamakis** case ruled that the owners due process rights were violated by quick action because it denied them the opportunity to conduct pre deprivation discovery necessary for the preparation of their defense to the taking. In the

present case, the quick action denied owners the pre deprivation opportunity to conduct discovery necessary for the preparation of their defense to the taking.

Many jurisdictions today throughout the country have quick take statutes that presume the validity of the taking and that the postdeprivation compensation remedy is enough to satisfy due process, regardless of the adequacy of the postdeprivation remedy.[9]

Condemnation is an extreme example of government coercion. Its effects on property owners are severe, not only in the form of economic deprivation, but in emotional, psychological, and social terms as well. Condemnations that take the land of innocent citizens without affording them the opportunity to conduct pre deprivation discovery necessary to defend the taking of their property, immediate possession of private property by government and protracted litigation by property owners delaying payment until all appeals are exhausted, are fundamentally unfair. They threaten not only the legal standards established by the Constitution, but also the more abstract social values of citizenship and domestic tranquility. California's quick take procedure should not be allowed to become law of the land.

Only this Court can restore the **5th** and **14th Amendments** as effective constitutional limits on the abuse of government power. As noted above, the Court has repeatedly declared that courts must decide according to the

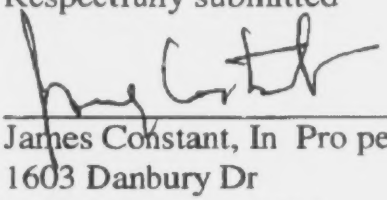
[9] A survey cited by the US Department of Transportation finds no state with pre deprivation discovery. *See* http// www.fhwa.dot.gov/realestate/aashto2006/emdomain.htm

"supreme law of the land". This Court should restore the Constitution's protections for private property not only to ensure that the law is followed as written, but also to ensure that citizens can trust in the security of their property, and in fair and equal treatment by the governments under which they live.

CONCLUSION

The Petition For Writ of Certiorari to The Supreme Court of California should be granted.

Dated: 7 September, 2009 Respectfully submitted

By: 

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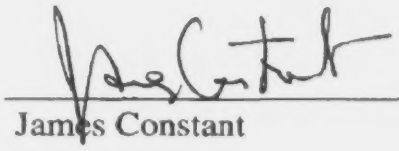
CERTIFICATE OF COMPLIANCE
WITH RULE 33 OF COURT

I certify that this brief contains 4,413 words (computer count) which is less than the 9,000 word limit.

Dated: 7 September, 2009

By: 

James Constant

Court of Appeal, Fourth Appellate District, Division Two - Nos. E044802/E045320/E046012

S173448

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE EX REL. DEPARTMENT OF TRANSPORTATION, Plaintiff and

Respondent,

v.

JAMES CONSTANT, Defendant and Appellant.

The motion to dismiss case is denied.
The petition for review is denied.

George, C.J., was absent and did not participate.

BAXTER
Acting Chief Justice

SUPREME COURT
FILED
JUL 22 2009
Frederick K. Ohlrich
Clerk

Supreme Court of California
350 McAllister Street
San Fransisco, CA 94102-4783

People v. State of California
Plaintiff and Respondent S173448

v. (Ct. App. Nos E044802,45320)
(Sup.Ct.No. SCV96961)

James Constant
Defendant and Appellant

MOTION TO DISMISS CASE AND
MEMORANDUM IN SUPPORT THEREOF

James Constant
1603 Danbury Dr, pro per
Claremont, CA 91711
909 624 1801
constantrcs@cs.com

MOTION TO DISMISS

Appellant moves this Court to dismiss this case (Court Appeal consolidated cases E044802 and E045320) on grounds, first, a constitutional taking was not made and, second, a constitutional payment was not made.

This motion is based upon the attached memorandum of points and authorities, and the files of record of this case, and such other and further evidence as may properly come before this Court at a hearing of this matter.

Pursuant to California Rules of Court, Appellate Rule 8.54, any showing in opposition to this motion shall be served and filed within 15 days after the service of the motion.

Dated: 7 July, 2009 Respectfully submitted

By: _____

James Constant, In Pro per

MEMORANDUM

Introduction

This is an eminent domain action in which plaintiff The People of the State of California, acting by and through the California Department of Transportation ("Caltrans" or "State"), seeks to condemn certain real property owned by defendants James and Robert Constant**[1]** in a quick take action pursuant to **Code of Civil Procedure ("C.C.P") §1263.110[2].** The State took possession of the property on 11/19/02 and filed a Notice of Deposit on 11/20/02. *See* Clerk's Transcript ("CT") 748. A jury trial was held and the courts below determined in favor of the State. No deposit was made in court and no prompt release of payment to appellant was made by the State.

The Proceedings Below

Appellant filed proposed jury instructions (100% damage, no benefits) (CT 180) and, on 6/18/07 because of a rapid increase in land value (CT 745), made a final demand for compensation of $4,112,114 for his ½ interest in the entire 5 acre property plus interest since 11/23/02 the date of possession (CT 460). The trial court refused appellant's jury instructions and adopted the State's jury instructions which called for damage and benefits to the remainder. Based on the 11/23/02 date of possession, the jury rendered its verdict in favor of appellant $547,707 = $390,756 for part taken +

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[1] Robert Constant having filed a settlement of his claim with the State before trial has been dismissed from this action.

$655,646 damage to remainder - $498,695 benefits to the remainder (CT 628). Post verdict motions were filed. The trial court denied appellant's Motion for a New Trial and granted the State's Motion for Judgment Notwithstanding the Verdict ("JON") awarding appellant half the JON award "for his half interest" in the property (CT 849). Appellant filed a Motion to Set Aside The Judgment which was denied by the trial court.

The court of appeal reversed the judgment in Case E046012 (costs) and affirmed the judgments in Cases E044802 (Non constitutional and constitutional claims) and E045320 (Motion to Dismiss under Section 1268.020). A Petition for Rehearing was denied. The decisions below make just compensation depend on state statutory provisions which appellant contends are error on merits and repugnant to the California and Federal Constitutions. *See* Petition for Review.

Legal Argument

A constitutional taking has not occurred.

Under the State Constitution, a taking occurs when compensation has first been paid to, or into court for the owner. Immediate possession is authorized upon deposit in court and prompt release to the owner of money determined by the court to be the probable compensation by a jury.

> **Article I, section 19** of the California Constitution provides: "*Private property may be taken or damaged* for public use *only when just compensation, ascertained by a jury unless waived, has first been paid to, or into*

> *court for, the owner.* The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings *upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation.[the jury will award]"* (See also, **US Const., 5th Amend**. [private property shall not be taken for public use without just compensation]. *Italics added.* **Mt San Jacinto Community College Dist. v. Superior Court (2007), 40 Cal. App. 4th. fn 1**

Under the 5th Amendment, a taking occurs when payment is made after trial. **Kirby Forest Industries Inc. v. United States (1984) 467 US 1, 17-18 (Kirby)**. ("A constitutional taking occurs when the owner is finally paid after trial").

A constitutional payment was not made

Art. 1, §19 of the State Constitution requires payment into court and prompt release to the owner of probable compensation determined before trial before taking and, under the 5th Amendment, valuation is preliminary to actual taking.

> "The proceeding for the ascertainment of the value of the property and consequent compensation to be made, is merely an inquisition to establish a particular fact *as a preliminary to the actual taking;* and it may be

> prosecuted before commissioners or special boards or the courts, with or without the intervention of a jury, as the legislative power may designate" *Italics added.* **United States v. Jones, 109 U. S.513, 519 (1883).**

The Federal constitution also requires that "rapid land value increases between the dates of taking and trial must be compensated for in order to provide just compensation" and a "substantial delay between valuation and payment necessitates procedure for modifying award to reflect value at time of payment", **Kirby Forest Industries, Inc. v. United States, 467 US 1,17 (1984).**

Thus, under both State and Federal law, the valuation and payment of private property are preliminary to its taking by eminent domain, and rapid land increases and delay in valuation and payment require modifications to reflect value at time of payment. In California's quick action process, the taking of private property is preliminary to its valuation and payment and offers no rules for rapid land increases and delay in payments. The quick action process affords the State a means of acquiring property immediately and affords the owner the right to endless litigation with payment withheld until all appeals have been exhausted, all under color of state authorities and statutory provisions for taking private property in violation of constitutional requirements for just compensation and equal treatment of litigants. **Nordlinger v. Hahn, 505 US 1 (1992)**

("equal treatment is violated absent a valid policy reason for the disparity between litigants").

Allowing just compensation to depend on State authorities and statutory provisions *ascertained by the trial court* would be unconstitutional because it gives the trial court powers to decide all issues of when a taking occurs, of vacating *just compensation ascertained by a jury* by JON verdict, and by withholding when payment is to be *first paid to, or into court, and prompt release to the owner of money*, all in violation of **Cal. Const. Art. 1, §19** which expressly confers these powers on a jury. Local rules or procedures must not discriminate against the federal law or affect the availability of a federal right. **Davis v. Wechsler, 263 US 22,24 (1923).** Petitioner's just compensation cannot be made to depend the State's deposit or JON award based on State statutory provisions. **Seaboard Air Line Ry. v. US (1923) 261 US 299, 304.** State and federal statutory provisions have been invalidated when necessary to ensure just compensation to the owner. **Kirby Forest Industries Inc. v. United States (1984) 467 US 1, 17 (Kirby)**

Since no constitutional taking has occurred and since no constitutional payment was made, the Court should dismiss the case. A proposed order is attached.

Dated: 7 July, 2009 Respectfully submitted

By: _____

James Constant, In Pro per
1603 Danbury Dr
Claremont, CA 91711

Supreme Court of California
350 McAllister Street
San Fransisco, CA 94102-4783

People v. State of California
Plaintiff and Respondent S173448

v. (Ct. App. Nos E044802,45320)
(Sup.Ct.No. SCV96961)

James Constant
Defendant and Appellant

[PROPOSED] ORDER
RE: MOTION TO DISMISS CASE

Based upon the motion, the memoranda of points and authorities filed in support thereof and opposition thereto, including all items and citations thereto, the Court hereby rules as follows:

THE MOTION IS GRANTED. The Court :

1. INVALIDATES state statutory provisions and DISMISSES consolidated Cases E044802 and E045320;

2. DECLARES that the quick action process deprives appellant of the just compensation provisions of the Federal and State Constitutions and of the equal treatment provision of the Constitution;

3. DECLARES that under California's Constitution the trial court lacks power to decide all issues of just compensation;

4. DECLARES that appellant James Constant is the sole remaining owner with 100% interest in the subject property and claimant for the payment of just compensation for the taking by State of the subject property;

5. ORDERS the State of California to reinstate the subject property to its prior condition, no later than three (3) months from the date of this order;

6. ORDERS the State of California to pay appellant annual interest of 10% x $8,224,228 = $822,422 for his 100% interest in the entire 5 acre property (100% damage, no benefits), as just compensation and damages for the temporary taking of the subject property between 11/20/02, the date of commencement of the action, and the date the property reverts to its prior condition;

7. ORDERS State of California to pay appellant's claims of mandated statutory costs in the trial and appeal courts;

8. ORDERS State of California to pay appellant's attorney's fees, if any, in the trial and appeal courts; and

9. ORDERS a monetary sanction of $ _____ pursuant to C.C.P. §128.7(d) "for violation of subdivision (b) . . . sufficient to deter repetition of this conduct [by State] or comparable conduct by others similarly situated".

This court retains jurisdiction over all matters in this order until the State of California files a letter of satisfaction duly executed by appellant.

DATED _____

_____

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court rule 8. 1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT DIVISION TWO

Filed May 13 2009

THE PEOPLE ex rel. DEPARTMENT OF TRANSPORTATION,

Plaintiff and Respondent,

E044802, E045320, E046012
(Super.Ct.No. SCV5S096961)
OPINION

v.

JAMES CONSTANT,

Defendant and Appellant.

APPEAL from the Superior Court of San Bernardino County. Christopher J. Warner, Judge. Affirmed in part and reversed in part with directions.

James Constant, in pro. per., for Defendant and Appellant.

Bruce A. Behrens, Linda Cohen Harrel, Eric J. Fleetwood, and Robert W. Vidor, for Plaintiff and Respondent.

In 1996, the California Department of Transportation (the State) determined that the 1-2 10 freeway would be extended through Fontana. In November 2002, the State was authorized to take one and one-half acres of a five-acre parcel owned by defendant James

1

Constant (Constant), and his brother Robert Constant (Robert), which was located in Fontana. The State also was granted a temporary construction easement to construct the resulting frontage road that would cross the property. The State deposited probable compensation as required for a quick-take action, and in 2004, the trial court determined in a bifurcated proceeding that the taking of the property was proper.

A jury trial on compensation was set. Just prior to trial, Robert settled with the State. Constant represented himself at trial, as he does on appeal. The jury award on the fair market value of the property taken exceeded the only expert's opinion on the value of the property, so the trial court granted the State's judgment notwithstanding the verdict (JON), reducing the amount of the jury award. Constant was awarded one-half of the verdict for one-half ownership of the property.

Constant filed three separate appeals, case Nos. E044802, E045320, and E046012, which we have

consolidated into the instant appeal. Constant claims in the three appeals:[1]

2

1. The trial court erred in granting the State's right to take and by denying Constant's MIL (motion or motions in limine) Nos. 3, 5, and 16 in regard to the taking.

2. The trial court made numerous errors as to compensation issues, including resetting the date of value of the property on the State's motion, excluding Constant's evidence of increasing land values, and allowing the State to introduce benefits evidence in regard to severance damages and enhancements.

3. The trial court made numerous errors during trial by allowing the State's appraiser to testify when the appraiser's evidence was not credible and by precluding Constant's own testimony on value.

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[1] Constant's opening brief in case No. E044802 is bordering on indecipherable. The State's brief provides little or no assistance to this court in determining the issues raised by Constant and the proper resolution. Accordingly, we will consider Constant's claims on appeal to be those set forth on pages *35* through 47 of his opening brief, which he himself designates as the issues he is raising on appeal. If in fact there are other issues being raised in the brief, he has failed to meet his burden of presenting this court with those issues in an understandable manner. Constant also provides further argument in his reply brief on issues he made in the opening brief. We will not review any new claims or arguments that Constant raises for the first time in the reply brief. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th *754*, 764.)

4. The trial court erroneously granted the State's JON.

5. The trial court erred by denying Constant's motion for new trial and motion to set aside the judgment and by awarding him only one-half of the judgment.

6. State statutory provisions allowing quick-take actions should be ignored because they violate the United States Constitution and Article 1, section 19 of the California Constitution.

7. In case No. E045320, the trial court's denial of Constant's motion to dismiss for the State's failure to pay by the judgment was erroneous.

8. In case No. E046012, Constant is entitled to his statutory costs incurred in the lower court pursuant to Code of Civil Procedure sections 1268.710 and 1268.720.[2]

3

We agree with Constant that he was entitled to some costs pursuant to sections 1268.710 and 1268.720, and the trial court erred by denying costs by relying upon section 1250.410. Accordingly, we reverse the trial court's ruling denying any costs to Constant and remand to the lower court for a determination of the appropriate costs. We otherwise affirm.

4

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[2] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

**********pages 4-38 omitted**********
*******Non constitutional claims*******

VIII
CONSTITUTIONAL CLAIMS

It appears that Constant's final claims in case No. E044802 are that the quick-take process violates the state and federal Constitutions and that, since just compensation must be determined by a jury and since the trial court entered a JON, there was no proper determination of compensation.

Once again, Constant fails to provide any legal authority to support his claims. Although he provides further argument on these issues in the reply brief, we cannot consider arguments made for the first time in the reply brief. *(Reichardt v. Hoffman, supra,* 52 Cal.App.4th at p. 764.)

As to his claim that the quick-take action statutory scheme violates the state and federal Constitutions requirement that just compensation must be paid, these arguments were rejected in *Mt. San Jacinto.* (See *Mt. San Jacinto, supra,* 40 Cal.4th at pp. 659-661.) Further, as to the argument that a jury must decide issues of just compensation, the determination by the trial court based on the only fair market value presented was clearly supported by the evidence and does not violate Constant's constitutional rights to just compensation for property taken. This procedure was approved in *Aetna. (Aetna, supra,* 170 Cal.App.3d at p. 878.) We reject Constant's constitutional claims.

IX
MOTION TO DISMISS UNDER SECTION 1268.020, SUBDIVISION (B)(2)

In case No. E045320, Constant claims, "Under the facts of this case does the California Constitution require disregarding state statutory provisions and to dismiss the case to effectuate the purpose of the eminent domain law?"

A. *Additional Factual and Procedural Background*

On January 28, 2008, Constant filed his motion to dismiss the eminent domain proceedings pursuant to section 1268.020, subdivision (b)(2) and California Constitution, article 1, section 19. He contended that the State had failed to pay the judgment in the time required, and therefore section 1268.010 required dismissal of the eminent domain proceedings. The State opposed on the ground that Constant had filed an appeal, and therefore the judgment was not final. Further, Constant had refused to provide taxpayer identification information. Constant argued in his reply that he could appeal and receive compensation; otherwise section 1268.010 violated his federal constitutional rights.

A hearing on the motion was heard on March 5, 2008, but no transcript was included in the record on appeal. According to the minute order, the trial court concluded that "the time requirements of CCP 1268.010(A) have not been triggered by a final judgment in this matter and thus, the requisites of CCP 1268.020 cannot be established." (Capitalization omitted.)

B. *Analysis*

Section 1268.0 10, subdivision (a) provides, "Not later than 30 days after final judgment, or 30 days after the conclusion of any other court proceedings, including any federal court proceedings, commenced by the defendant challenging the judgment or any of the condemnation proceedings, whichever date is later, the plaintiff shall pay the full amount required by the judgment." Section 1268.020, subdivision (b)(2) provides that the eminent domain action can be dismissed if the payment is not made.

Section 1235.120 defines "final judgment" as "a judgment with respect to which all possibility of direct attack by way of appeal, motion for a new trial, or motion under Section 663 to vacate the judgment has been exhausted."

Clearly, at the time that the motion was filed and notice regarding payment was given to the State, Constant had filed his appeal in case No. E044802. Hence, under the plain language of the statute, there was no final judgment to be paid.

Constant essentially claims that section 1268.010 is unconstitutional because he is entitled to just compensation, and such compensation should not be delayed by his challenging the judgment. Constant's entire argument is premised upon his belief that he. did not or will not receive just compensation. As stated, *ante*, we believe the JON was proper and reflected the fair market value of the property. The State already deposited $187,000 of probable compensation. The deposit earns statutory interest until it is withdrawn. (§1268.310.) The California Supreme Court has approved of the quick-take process. *(Mt. San Jacin to, supra,* 40 Cal.4th at pp. 659-661.) Constant has failed to show that

he will not receive just compensation due to the provisions of section 1268.010. As such, he cannot show that his constitutional rights are implicated.

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**********pages 42-43 ommitted**********
**********(Cost claims)**********

DISPOSITION

We reverse the trial court's order denying costs to Constant. We remand for the sole purpose for the trial court to determine the appropriate costs incurred at trial to be awarded Constant pursuant to sections 1268.710 and 1268.720. We otherwise affirm the judgment. Constant shall recover his costs on appeal pursuant to Code of Civil procedure section 1268.720.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI

We concur:

RAMIREZ

HOLLENHORST

MINUTE ORDER

Case SCVSS96961 - THE PEOPLE OF THE STATE -V- CONSTANT

MOTION RE: TO DISMISS THE EMINENT DOMAIN PROCEEDING FILED BY DEFENDANT JAMES CONSTANT
03/05/2008 - 8:30 AM DEPT. S35

JUDGE: CHRISTOPHER J. WARNER

CLERK: GAIL ANDERSON

COURT REPORTER CRAIG ANDERSON

COURT ATTENDANT ROBERT BRUCATO

ATTORNEY INFORMATION

ATTORNEY E. FLEETWOOD PRESENT FOR PLAINTIFF/PETITIONER.

DEFENDANT, JAMES CONSTANT PRESENT IN PRO PER.

PROCEEDINGS:

JAMES CONSTANT'S MOTION TO DISMISS THE EMINENT DOMAIN PROCEEDINGS IS HEARD. ARGUED BY COUNSEL AND SUBMITTED.

JAMES CONSTANTS MOTION TO DISMISS THE EMINENT DOMAIN PROCEEDINGS IS DENIED. WITHOUT PREJUDICE

THE COURT FINDS THAT THE TIME REQUIREMENTS OF CCP 1268.01 0(A) HAVE NOT BEEN TRIGGERED BY A FINAL JUDGMENT IN THIS MATTER AND THUS, THE REQUISITES OF CCP 1268.020 CANNOT BE ESTABLISHED.

NOTICE WAIVED.
MINUTE ORDER END

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO
Civil Division - Dept S35
303 Wst Third St
San Bernardino, CA 92415

FILED
Oct 26 2007

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN BERNARDINO SAN BERNARDINO DISTRICT

THE PEOPLE OF THE STATE OF
Case No. SCVSS 096961
CALIFORNIA, acting by and through the
Department of Transportation,

RULING ON SUBMITTED MATTER MOTION FOR NEW TRIAL

Plaintiff,

v.

JAMES CONSTANT;ROBERT N. CONSTANT; ARGEREY CONSTANT; ATHENA CONSTANT; NICHOLAS CONSTANT; DOE ONE to DOE TWENTY, Inclusive

Defendants

1. Motion for New Trial brought by Defendant James Constant is denied.

2. Motion for Judgment Notwithstanding Verdict by plaintiff pursuant to C.C.P. 629 is granted. Judgment is ordered entered in favor of defendant James Constant in the amount of $97,094.50 plus costs of $220.00. The jury verdict in this matter is against the law (CACI 3515; Aetna Life and Casualty Company vs. City of Los Angeles (1985) 170 CA 3(d) 865). The verdict far exceeded the "ceiling" for recovery set by the testimony of plaintiffs valuation expert, Warren H. Neville. (See Marshall vs. Department of Water and Power (1990) 219 Cal App 3rd 1124,1145-1146). Defendant did not present valuation testimony, although he could have, notwithstanding the court's grant of motions in limine precluding the testimony of defendant James Constant. Robert Constant, co-owner of the property, had retained a valuation expert as to the property and that expert was deposed by plaintiff. That expert could have been called by James, but was not. The only valuation testimony was given by Neville. A verdict exceeding the amount of Neville's opinion is therefore impermissible. The jury apparently performed its own appraisal, which it may not do.

Neville's opinion of value, including a temporary construction easement, was in the net amount of $194,189.00. The court finds that James Constant is entitled to half that amount for his 50% interest. The court therefore orders judgment in the amount of 10 $ 97,064.50 for James Constant, plus costs of suit, pursuant to a timely filed cost bill and subject to motion to tax.

Dated this 26 day of October, 2007

Christopher J. Warner
Judge of the Superior Court

FILED-Central District
SUPERIOR COURT
SAN BERNA1DINO COUNTY
OCT 26 2007

BRUCE A. BEHRENS, Chief Counsel
LINDA COHEN HARREL, Deputy Chief Counsel
STEPHEN M. CHASE, Assistant Chief Counsel
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CAROL QUAN Assistant Chief Counsel
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ERIC J. FLEETWOOD, Deputy Attorney, State Bar No. 156030. Attorneys for Plaintiff, The People of the State of California, acting by and through the Department of Transportation

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO

THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the Department of Transportation,

Plaintiff,

-vs-

JAMES CONSTANT; ROBERT N. CONSTANT, ARGEREY CONSTANT; ATHENA CONSTANT; NICHOLAS CONSTANT; DOE ONE to DOE TWENTY Inclusive,

Defendants.

No. SCVSS 096961
Parcel 18488 -1, -2.
Case filed: November 20, 2002
Assigned For All Purposes To:
Honorable Judge Chnstopher J. Warner
Department S-35

TRIAL: August 14, 2007
TIME: 9:30 A.M.
DEPT: S-35

INTERLOCUTORY JUDGMENT IN CONDEMNATION AS TO DEFENDANT JAMES CONSTANT BY PLAINTIFF STATE OF CALIFORNIA

This proceeding for the condemnation for State highway purposes of the real property situated in the County of San Bernardino, State of California, and more particularly described in plaintiffs complaint on file herein as Parcels 18488-1 and 1.8488-2, came on regularly for trial on August 14, 2007, in Department S-35 of the above-entitled court, before the Honorable Christopher J. Warner, Judge of the Superior Court, and a jury sworn to try the issue of

compensation.

Eric J. Fleetwood and Raymond Barrera appeared as attorneys for plaintiff, and defendant James Constant appeared in pro persona.

Evidence was introduced on the issues, the cause was argued by counsel and defendant, and the jury was instructed by the court; whereupon the jury retired and deliberated and subsequently returned to court and rendered its verdict. Subsequently, plaintiff State of California filed its 'Motion for Judgment Notwithstanding the Verdict.

The court grants the State's Motion for Judgment Notwithstanding the Verdict, and upon the evidence and the entire proceedings, and GOOD CAUSE APPEARING THEREFOR, IT IS HEREBY ORDERED, ADJUDGED AND DECREED, AS FOLLOWS:

1. The verdict returned by the jury on August 23, 2007, is contrary to law, and unsupported by the evidence. The amount of the just compensation awarded to defendant James Constant for ,the acquisition of his one-half interest in Parcels 18488-1 and 18488-2 is $97,094.50. This amount, together with prejudgment interest, calculated at the Surplus Money Investment Fund rate, pursuant to Code of Civil Procedure sections 1268.310 and 1268.350, shall be paid in to court for the benefit of defendant James Constant. Interest shall be calculated on the amount of $97,094.50 from December 13, 2002, the date of possession, until paid.

2. Upon payment of the said total sum into court for the benefit of defendant James Constant, said parcel shall be condemned to plaintiff and as against defendant James Constant for state highway purposes, in fee simple absolute, unless a• lesser estate is described, and all interests of said defendants in and to said parcel shall be terminated.

3. The payment into court of said total sum of money as herein above specified, shall be in full payment for said parcels and for damages of every kind and nature suffered or to be suffered by reason of the acquisition of said parcels and the construction and use of the project in the manner proposed by plaintiff.

4. The purpose for which said parcel is sought to be condemned is a public use authorized by law, and the taking of said parcel is necessary for such public use.

5. Defendant. James Constant is entitled to compensation for the acquisition of his one-half interest in Parcels 18488-1 and 18488-2 as specified in the Interlocutory Judgment in Condemnation As To Robert Constant. Defendants Athena Constant, and Nicholas Constant, having disclaimed on February 6, 2003, any and all rights to the real property described in plaintiffs complaint are not entitled to any compensation herein or further compensation. Defendant Argerey Constant, having disclaimed on September 9 2007, any and all rights to the real property described in plaintiffs complaint are not entitled to any compensation herein or further compensation.

6. Possession having been taken by plaintiff on December 13, 2002, all taxes, penalties and costs which are a lien on said parcel and which are apportioned to that portion of the fiscal year after said date are hereby canceled pursuant to Section 5081 et seq. of the Revenue and Taxation Code.

7.. Defendant James Constant has and does recover of and from plaintiff its costs of suit incurred herein, in the sum of $220.00.

DATED: October 26, 2007

Honorable Christopher J. Warner
JUDGE F THE SUPERIOR COURT

Supreme Court, U.S.
FILED
NOV 2 8 2009
OFFICE OF THE CLERK

No. 09-381

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2009

JAMES CONSTANT,

Petitioner,

v.

Superior Court of the State of California, County of San Bernardino, S-35, Case No. SCVSS 096961

Court of Appeal of the State of California, 4th District Div 2 Consolidated Cases E044802 and E045320

Supreme Court of California Case S173448

THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and Through the Department of Transportation, Real Party in Interest

Respondents.

APPENDIX
TO RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

Robert W. Vidor, Bar No. 30312
100 South Main Street, Suite 1300
Los Angeles, California 90012-3702
Telephone: (213) 687-6000
Facsimile: (213) 687-8300

Attorney for Respondent, The People of the State of California, acting by and through the Department of Transportation

APPENDIX

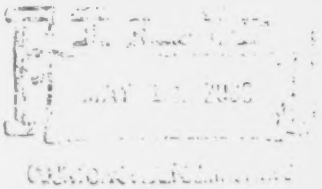
NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO



THE PEOPLE ex rel. DEPARTMENT OF TRANSPORTATION,

Plaintiff and Respondent,

v.

JAMES CONSTANT,

Defendant and Appellant.

E044802, E045320, E046012

(Super.Ct.No. SCVSS096961)

OPINION

APPEAL from the Superior Court of San Bernardino County. Christopher J. Warner, Judge. Affirmed in part and reversed in part with directions.

James Constant, in pro. per., for Defendant and Appellant.

Bruce A. Behrens, Linda Cohen Harrel, Eric J. Fleetwood, and Robert W. Vidor, for Plaintiff and Respondent.

In 1996, the California Department of Transportation (the State) determined that the I-210 freeway would be extended through Fontana. In November 2002, the State was authorized to take one and one-half acres of a five-acre parcel owned by defendant James

Constant (Constant), and his brother Robert Constant (Robert), which was located in Fontana. The State also was granted a temporary construction easement to construct the resulting frontage road that would cross the property. The State deposited probable compensation as required for a quick-take action, and in 2004, the trial court determined in a bifurcated proceeding that the taking of the property was proper.

A jury trial on compensation was set. Just prior to trial, Robert settled with the State. Constant represented himself at trial, as he does on appeal. The jury award on the fair market value of the property taken exceeded the only expert's opinion on the value of the property, so the trial court granted the State's judgment notwithstanding the verdict (JNOV), reducing the amount of the jury award. Constant was awarded one-half of the verdict for one-half ownership of the property.

Constant filed three separate appeals, case Nos. E044802, E045320, and E046012, which we have consolidated into the instant appeal. Constant claims in the three appeals:[1]

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[1] Constant's opening brief in case No. E044802 is bordering on indecipherable. The State's brief provides little or no assistance to this court in determining the issues raised by Constant and the proper resolution. Accordingly, we will consider Constant's claims on appeal to be those set forth on pages 35 through 47 of his opening brief, which he himself designates as the issues he is raising on appeal. If in fact there are other issues being raised in the brief, he has failed to meet his burden of presenting this court with those issues in an understandable manner. Constant also provides further argument in his reply brief on issues he made in the opening brief. We will not review any new claims or arguments that Constant raises for the first time in the reply brief. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764.)

1. The trial court erred in granting the State's right to take and by denying Constant's MIL (motion or motions in limine) Nos. 3, 5, and 16 in regard to the taking.

2. The trial court made numerous errors as to compensation issues, including resetting the date of value of the property on the State's motion, excluding Constant's evidence of increasing land values, and allowing the State to introduce benefits evidence in regard to severance damages and enhancements.

3. The trial court made numerous errors during trial by allowing the State's appraiser to testify when the appraiser's evidence was not credible and by precluding Constant's own testimony on value.

4. The trial court erroneously granted the State's JNOV.

5. The trial court erred by denying Constant's motion for new trial and motion to set aside the judgment and by awarding him only one-half of the judgment.

6. State statutory provisions allowing quick-take actions should be ignored because they violate the United States Constitution and Article 1, section 19 of the California Constitution.

7. In case No. E045320, the trial court's denial of Constant's motion to dismiss for the State's failure to pay by the judgment was erroneous.

8. In case No. E046012, Constant is entitled to his statutory costs incurred in the lower court pursuant to Code of Civil Procedure sections 1268.710 and 1268.720.[2]

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[2] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

We agree with Constant that he was entitled to some costs pursuant to sections 1268.710 and 1268.720, and the trial court erred by denying costs relying upon section 1250.410. Accordingly, we reverse the trial court's ruling denying any costs to Constant and remand to the lower court for a determination of the appropriate costs. We otherwise affirm.

I

PROCEDURAL BACKGROUND

Acting on behalf of the State, the San Bernardino County Board of Supervisors adopted a resolution of necessity to condemn one and one-half acres of the five-acre parcel owned by Constant and Robert located on the east side of Sierra Avenue in Fontana. Robert and Constant had refused the State's offer to buy the property. The property was to be used to create a freeway frontage road called Casmalia Street in accordance with the extension of the I-210 freeway (the project). On May 21, 2002, the State deposited $187,000 pursuant to section 1255.010, subdivision (a), with an accompanying summary of valuation.

The Stated filed a complaint on November 20, 2002. Constant, along with Robert, filed an Answer.

On June 7, 2004, the trial court conducted a hearing, a transcript of which has not been made a part of the appellate record. The trial court issued a minute order finding, after considering all briefing and argument by counsel, that there was no gross abuse of discretion in the taking of the property to overcome the presumption.

Constant filed two petitions for writ of mandate in this court objecting to the right to take. On March 14, 2005, he filed a petition for writ of mandate in case No. E037664, raising several issues regarding his claim that the taking of his property was improper.[3] This court denied the petition on March 18, 2005, and Constant's petition for review to the California Supreme Court was denied. On April 18, 2005, Constant filed a second petition for writ of mandate in case No. E037897 in this court regarding the taking, which was denied, and his petition for review was also denied.

Prior to the jury trial on just compensation, Constant filed his 13 MIL, all of which were denied and will be discussed in more detail, *post*. The State filed five motions in limine (SMIL), the rulings of which are explicated further, *post*. Prior to trial, the State and Robert reached a settlement. The State agreed to pay Robert's one-half interest in the property, costs of suit, and interest.

Constant filed two more petitions for writ of mandate. The petition in case No. E038614 was from the denial of his request to increase the probable compensation and seeking a stay of the trial court proceedings. The petition and request for stay were denied by this court. Constant also filed a petition for writ of mandate on February 15, 2006, in case No. E039848, from the setting of the date of value, which was denied by this court. Constant's petition for review was also denied.

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[3] We take judicial notice of this petition for writ of mandate in case No. E037664 and the three other writ petitions in case Nos. E039848, E037897, and E038614 on our own motion.

After a jury trial on the value of the property, the jury entered its verdict that the fair market value of the portion acquired by the State as of November 20, 2002, was $390,756.85; the fair market value of the temporary construction easement was $6,036; the amount of severance damage to the remainder property was $655,646.89; and the amount of benefits to the remainder was $498,695.97. The total verdict for the portion taken was $390,756.85, a value of $6.13 per square foot for the part taken.

The State filed its motion for JNOV because the jury verdict did not match the fair market value evidence presented by the only expert in the case, as will be set forth in more detail, *post*. Constant filed a motion for new trial. The trial court granted a JNOV, reducing the verdict to $194,189 for the part taken based on the expert testimony regarding the value of the property and the construction easement. Constant was awarded half of the verdict since he owned only 50 percent of the property, or $97,094.50, plus $220 for the filing fee. Constant's motion for new trial was denied. The interlocutory judgment in condemnation was signed and entered on October 26, 2007.

Constant then filed a motion to set aside the judgment. It was denied, as will be discussed, *post*.

Constant also filed a motion to dismiss the eminent domain proceeding pursuant to section 1268.020, subdivision (b), based on the State's failure to pay the judgment. The motion was denied due to Constant's appeal in case No. E044802.

Constant then filed a memorandum of costs in the trial court pursuant to Code of Civil Procedure sections 1268.710 and 1268.720 and Revenue and Tax Code section

50811, asking for costs totaling $10,032.47. The State filed its motion to tax costs, arguing that pursuant to Code of Civil Procedure section 1250.410 Constant was entitled to no "litigation expenses." Constant filed a reply that he was not seeking costs under that section. The trial court granted the State's motion to tax costs and denied all costs to Constant.

II

FACTUAL BACKGROUND

At the trial, the State presented the testimony of Stephen McKee, a professional land surveyor. Constant's property was located off the I-210 freeway between the I-15 and I-215 freeways. The jury was shown maps of Constant's property and the surrounding area as it looked in 1997. The jury was also shown depictions of Constant's property as to the portion that was taken and the construction easement.

Constant's property was taken in order to accommodate a freeway on-ramp and to construct a frontage road for flow of traffic. The jury was shown a depiction of the two remaining portions of the property that still would be owned by Constant after Casmalia Street was constructed across Constant's property. A smaller parcel would remain south of the part taken, and a larger parcel would remain north of the taking. Casmalia Street was not part of the State freeway system, i.e. it was a frontage road, and it would be relinquished to the cities of Rialto and Fontana after the project was complete.

Constant then testified on his own behalf. He presented several exhibits, which depicted his property and the surrounding areas. He also noted to the jury that the way

his property was situated, there was a large residential development to the east of his property.

The State then presented the testimony of Warren Neville, who was an appraiser and was a member of the Appraisal Institute. He had 34 years of experience and had previously testified as an expert in other courts.

Neville began his appraisal of Constant's property by inspecting the property on November 26, 2002. He made a second inspection in April 2005. Neville explained that the scope of the project was the construction of an eight-lane freeway. There was an off-ramp at Sierra Avenue, which was near Constant's property. Two frontage roads were to be constructed, which included Casmalia Street. Neville indicated that Constant would have had knowledge that his property was going to be included in the I-210 freeway project on June 30, 1996, which Neville explained was the probable inclusion date. The project was officially accepted in late September 1996.

An aerial photograph of the Constant property and surroundings taken in 1997 was shown to the jury. The area surrounding the property was largely undeveloped. There were some houses and warehouses but no commercial development. Neville indicated that a nearby residential development called Sierra Lakes had been approved in 1994, to coincide with the anticipated expansion of the I-210 freeway project.

Neville only considered project influence up to the probable inclusion date of June 30, 1996. A lot of development in the area was driven by the freeway project. The date of value of Constant's property was set at November 20, 2002. Neville then set out to

find a value of Constant's entire property by comparable sales for the date of November 20, 2002, specifically excluding any project influence after June 30, 1996. Neville explained that such number would be the "before" condition value. Constant's property was long and narrow in the before condition, i.e. before the taking, which would restrict development, and was almost five acres. The property was surrounded by only surface streets. There was a nearby self-storage facility.

Constant's property was zoned light industrial in November 2002 but was subject to change to mixed use. Neville took into account the shape of the property at the date of value. One use was self-storage. A higher commercial use would require assemblage with another property. Further, there were no storm drains on the property, which would require a portion to be set aside for drainage. The most likely buyer of the Constant property would be an investor who would hold the property for six to 11 years until the I-210 project was complete.

Neville tried to find comparable sales for the property assuming the best use was as an investment that is held for several years. Neville compared investment properties that would be held. The comparable was vacant land, not property that had improvements.

Neville then testified as to six comparable sales (sales one through six) for the surrounding properties to establish the "before condition" value. The Lowe's value was $1.50 per square foot, and $3.67 was the highest value. These sales were conducted between 2001 and 2002. Neville concluded the value of Constant's property on

November 20, 2002, was $3 per square foot. Total market value for the entire five-acre parcel would be $640,341. The value of the part taken was only $191, 235. The value of the temporary construction easement for 23.3 months was $2,954.

The next step in Neville's valuation was to determine a value for the remainder property. Neville took into account damages to the property in that it no longer had access to Sierra Avenue, its remaining shape of the larger parcel to the north of the part taken was negative, and the 1,700 square feet that constituted the small piece south of the part taken was undevelopable. Without benefits from the project, the value of the remainder part for the date the portion would be taken was $227,034.

Neville then looked at the value of the remainder taking into account the added value of the project. He showed the jurors an aerial photograph of the area with the I-210 freeway on July 12, 2004. It was surrounded by the Sierra Lakes golf development and a shopping center with a Lowe's store and a bank. The property now had storm drains in place, and there was increased traffic, which benefitted commercial development. It was also probable that the Constant property would be purchased with other properties and assembled with adjacent properties. Assemblage would be beneficial to adjacent property owners who had the same kind of nonusable property. Neville took into account the freeway, the storm drain, and the fact that the Constant property was in the best position for assemblage.

Neville provided five comparable sales (sales seven through 11) to show the benefits from the project. The values of the "after condition" properties ranged from $8.27 per square foot to $15.07 per square foot.

After looking at all five sales, Neville concluded that the value of the remainder in the after condition was $9.50 per square foot including both parcels. Neville considered the remaining property to the north of the taken portion to be worth $1,405,820. The south portion was worth $16,350. This assumed assemblage. The property increased in value due to the project. The benefits to the remainder outweighed the severance damages, so nothing should be paid by the State for the remainder. The total amount to be paid to Neville should be $194,189.

On cross-examination, Neville stated that Casmalia Street was not a highway. It was a frontage road to be turned over to the City of Fontana once the project was completed. The comparable sales in eight through 11, were six to 15 miles from Constant's property. The before sale comparables were within four miles. Neville stated that he believed that comparable sales eight through 11 were sufficiently near the Constant property to comply with the requirements. Neville said it was not appropriate to consider sales eight through 11 for computing the before condition because they were freeway influenced.

Neville agreed that Constant's property was directly across the street from the Sierra Lakes property but denied the Sierra Lakes project had any before-condition influence on the property because it was developed in anticipation of the project.

Constant then testified in rebuttal. He stated that there had been no evidence admitted to show that there would be assemblage of his property with other properties. Constant objected to any valuation by Neville that relied upon assemblage. There was no evidence in the record that assemblage would work. There was no solution to his property standing alone.

III

RIGHT-TO-TAKE ISSUES

Constant contends under the heading "Right to Take Issues" that (1) the trial court erred by approving the State's right to take and by refusing to consider his MIL Nos. 3, 5, and 16, which addressed his objections to the right to take the property; and (2) that the trial court erred by denying his motion to vacate the order of possession due to the State's failure to provide an appraisal with the deposit, which was the subject of his MIL No. 11, and the granting of SMIL No. 4.

A. *Additional Factual and Procedural Background*

Constant's MIL No. 3 was a motion to preclude the taking of his property for a nonhighway purpose. Constant argued that the State could only take his property for highway purposes, and Casmalia Street was a frontage road. Constant filed a supplement to MIL No. 3. He included a transcript of the hearing for the resolution of necessity, claiming that it supported the State did not consider Casmalia Street a highway. Constant admitted that a related motion was denied on June 7, 2004, at the time the taking was approved.

The State filed opposition to MIL No. 3. It argued this was really a belated motion for reconsideration about the right to take. The trial court denied the motion, finding the State's opposition persuasive. It had already ruled on the right to take at the June 7, 2004, hearing. No further argument was made by Constant.

Constant's MIL No. 5 attacked the taking because the frontage road was not designed for the highway, but as part of the Sierra Lakes Specific Plan. Constant argued the road actually was for the benefit of the City of Fontana traffic flow. He argued that the neighboring property would have made a better frontage road.

Constant filed a supplement to MIL No. 5. He indicated that the State agreed that it designed Casmalia Street to comply with the City of Fontana's master plan. The State's admission that it designed Casmalia Street to conform with the City of Fontana's master plan violated section 1240.030. Constant admitted that a similar motion was denied on June 7, 2004.

The State filed opposition on July 3, 2007. It argued this MIL was just another objection to the right to take that was raised or could have been raised at the June 7, 2004, hearing.

The trial court denied MIL No. 5 based on the prior ruling on June 7, 2004. There was no further argument.

Constant filed MIL No. 11, which essentially argued that the original probable compensation was inadequate and was not accompanied by the proper appraisal. The State's original deposit was $187,000, but Constant claims the State paid higher amounts

for nearby properties at the same time. The appraisals done for probable compensation were inadequate. The State filed opposition to MIL No. 11. It argued these issues had already been decided, and this was just another attack on the right to take. MIL No. 11 was denied.

Constant filed MIL No. 16, which contended that his property could not be taken as a result of private meetings between the San Bernardino County Board of Supervisors and the State. The eventual resolution of necessity adopted was in violation of his due process rights. The State filed opposition to MIL No. 16 and argued it was again an attack on the right to take. The trial court denied MIL No. 16 on the ground the issue had already been decided at the right-to-take hearing on June 7, 2004.

In SMIL No. 4, the State sought to exclude evidence or testimony of the staff appraisal made in connection with the deposit of probable compensation. The State argued such exclusion was supported by Government Code section 6254.

In ruling on SMIL No. 4, the trial court found that the appraisal should be excluded under Code of Civil Procedure section 1255.060, subdivision (b). It did not agree to exclusion under Government Code section 6254. It was not an admission. The State's motion was granted.

B. *Analysis*

An owner is entitled to just compensation for property taken for public use. (Cal. Const., art. I, § 19; U.S. Const., 5th Amend.; Code Civ. Proc., § 1263.010, subd. (a).) "The only constitutional limitations on the right of eminent domain are that the taking be

for a public use, and that just compensation be paid." (*Mt. San Jacinto Community College Dist. v. Superior Court* (2007) 40 Cal.4th 648, 664 (*Mt. San Jacinto*)

"Where objections to the right to take are raised, unless the court orders otherwise, they shall be heard and *determined prior to the determination of the issue of compensation*." (§ 1260.110, subd. (a), italics added.) "A person having an interest in property described in a resolution of necessity may obtain judicial review of the validity of the resolution *before* the eminent domain action via a writ of mandate pursuant to section 1085 or *after* the commencement of the eminent domain proceeding by objection to the right to take." (*Inglewood Redevelopment Agency v. Aklilu* (2007) 153 Cal.App.4th 1095, 1114 (*Inglewood*); see also *Mt. San Jacinto*, *supra*, 40 Cal.4th at p. 665 ["[t]he owner may seek review of the issue by extraordinary writ"].)

Here, the trial court decided the issue of the right to take the property prior to the trial on compensation, a proper procedure. (§ 1260.110.) Constant filed several petitions for writ of mandate in this court objecting to the right to take, including that the probable compensation was inadequate, the State's environmental impact report (EIR) was inadequate, and the taking did not comply with section 1240.030. His petitions for review to the California Supreme Court were denied. The proper review of the right to take issue was through a petition for writ of mandate. (*Mt. San Jacinto*, *supra*, 40 Cal.4th at p. 665; *Inglewood*, *supra*, 153 Cal.App.4th at p. 1114.)

Furthermore, the trial court's decision to deny MIL Nos. 3, 5, 11, and 16 and grant SMIL No. 4, which all pertained to issues that the trial court had already decided in a

bifurcated proceeding regarding the taking, are not properly reviewed in this case. We cannot say that the trial court's denial of Constant's MIL that sought to revisit issues regarding the taking were not properly denied. The issue had been litigated, and the trial court noted that there was no new issue to decide.

Constant claims that the trial court erroneously denied his MIL because they raised different issues than discussed during the right-to-take proceedings.[4] However, he has not provided in the appellate record a transcript of the hearing regarding the original decision on the taking or his legal briefing filed below. Hence, it is unclear what issues the trial court relied upon in denying the taking. It is Constant's burden to provide an adequate record on appeal. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140-1141.) We cannot even consider whether the trial court erred in concluding MIL Nos. 3, 5, 11, and 16 were already considered and denied, as Constant has failed to provide an adequate record.

Finally, we understand Constant's claim regarding the granting of SMIL No. 4 to be that the trial court erred by excluding the State's staff appraisal done with the probable compensation deposit. The trial court properly excluded the evidence pursuant to Code of Civil Procedure section 1255.060, subdivision (b), which excludes appraisals accompanying probable compensation from trial. To the extent Constant is arguing that

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[4] We also note that Constant relies upon *Mt. San Jacinto Community College Dist. v. Superior Court* (2005) 126 Cal.App.4th 619; however, this case was superseded by *Mt. San Jacinto, supra*, 40 Cal.4th 648.

the State failed to provide adequate appraisals with the deposit of probable compensation as required by Government Code section 7267.2, that pertains to the right to take and should have been raised in a petition for writ of mandate.

In sum, we cannot conclude the trial court's refusal to entertain Constant's MIL Nos. 3, 5, 11, and 16, pertaining to issues the trial court considered had already been decided in the right to take hearing, was error. Further, any issues regarding the taking of the property have already been adjudicated, and Constant has provided absolutely no authority that would allow us to consider the right to take that was already rejected by the trial court, this court, and the Supreme Court. Constant had the opportunity to raise all of his objections to the right to take in a petition for writ of mandate. Any arguments against the taking will not be considered on appeal. The only proper issues before this court are those pertaining to trial on the just compensation.

IV

COMPENSATION ISSUES

Constant makes several interrelated contentions under his heading "Rulings on Compensation Issues," but the first three essentially all relate to the trial court's setting of the value date to November 20, 2002. He also claims the trial court erred by denying his MIL Nos. 9, 14, and 16, because the State had admitted that there were no curable damages, and he was entitled to 100 percent compensation for the remainder. He claims that the denial of MIL Nos. 1 and 2 was erroneous because the State's EIR was improper.

Finally, he claims exclusion of evidence of Sierra Lakes Development plan to show it enhanced the property in the before condition, not the project, was erroneously denied.

A. *Valuation Date*

1. *Additional factual background*

On March 8, 2007, the State filed a motion to reset the date of valuation from June 7, 2004, to November 20, 2002, which was the date the State deposited the probable compensation, due to the recent case of *Mt. San Jacinto, supra*, 40 Cal.4th 648.

Constant filed opposition to resetting the date of valuation. He claimed the amount of probable compensation was inadequate, and therefore *Mt. San Jacinto* was not applicable. Constant argued the proper date of value was the trial date. To this motion, he attached numerous exhibits regarding valuation and adjoining properties.

On March 28, 2007, the State filed a reply to both oppositions. The State argued Constant was estopped from arguing about the amount of deposit because the issue had already been rejected by the court.

A hearing was conducted on April 3, 2007, a transcript of which has not been included in the record. According to the minute order, the trial court sustained the State's objections to the documents attached to Constant's opposition. The State's motion to reset valuation to November 20, 2002, was granted.

Constant filed MIL No. 7, which moved the trial court to increase the probable compensation and to set the date of value as the date of trial. Constant argued that the date of value should be October 19, 2005, and that the probable compensation should be

increased to $8,224,228. Constant argued that the amount deposited was short of the value of the property and therefore did not set the date of value. The State filed opposition. It noted that Constant's previous attempts to increase the probable compensation had been denied on May 26, 2005, and reconsideration had been denied on July 11, 2005.

MIL No. 7 was denied by the trial court, as the issue had been denied previously, at three separate hearings.

SMIL No. 1 sought to exclude evidence of value of the subject property other than as of the date of value, November 20, 2002. Remainder value was also November 20, 2002. The trial court granted the State's motion and excluded all evidence of valuation other than the date of value, which was November 20, 2002. The trial court found that the adequate determination of date of value had been made.

2. *Analysis*

If a condemner wants to take immediate possession of property, the condemner must deposit probable compensation with the court. (§ 1255.010.) This is called a quick-take eminent domain action. (*Escondido Union School Dist. v. Casa Suenos De Oro, Inc.* (2005) 129 Cal.App 4th 944, 960.)

In *Mt. San Jacinto*, the condemner deposited the probable amount of compensation supported by an appraisal, and the deposit was deemed sufficient "probable compensation" by the trial court. (*Mt. San Jacinto*, *supra*, 40 Cal.4th at p. 662.) The trial court subsequently ruled that, given increasing property values, the statutory date of

valuation should not control and that the date of valuation would be the date of trial, resulting in a significant increase in the amount of compensation awarded. The Court of Appeal reversed, and our Supreme Court affirmed the appellate court's ruling. (*Id.* at pp. 654-656.)

The court noted that under California's statutory eminent domain law (§ 1230.010 et seq.), "if the compensation issue 'is brought to trial within one year after commencement of the proceeding, the date of [property] valuation is the date of commencement of the proceeding.' (§ 1263.120.)" (*Mt. San Jacinto*, *supra*, 40 Cal.4th at p. 653.) However, "[b]ecause compensation is immediately available to the property owner in a quick-take action, the date of valuation of the property is statutorily required to be no later than the date the condemner deposits 'probable compensation' for the owner. (§ 1263.110 et seq.) The deposit earns statutory interest until it is withdrawn. (§ 1268.310.) The property owner can immediately withdraw the funds, but by doing so waives all rights to dispute the taking other than the right to challenge the amount of just compensation. (§ 1255.260.)" (*Ibid.*)

The instant case is almost identical to *Mt. San Jacinto*. The State deposited the probable compensation of $187,000. It was supported by an appraisal. The trial court determined at numerous times that such probable compensation was adequate, and we have found nothing in the record to support that it was inadequate. Constant brought several motions to increase the deposit, which the trial court rejected. This court already rejected that the probable compensation was inadequate or that the date of value was

erroneous. We note that the valuation testimony by Neville (the only fair market value testimony) was extremely close to the probable compensation. We cannot say that the deposit was inadequate or that the trial court erred by setting the date of value as of November 20, 2002.

Accordingly, we believe the trial court did not err. The correct date for valuation was November 20, 2002, the date the trial court deposited the just compensation. Hence, any increase in value of the property was not properly considered by the jury or considered in compensation.

We reject Constant's claim that the delay in bringing the case to trial and rapid increase in property values changes the valuation date. Such contention was rejected in *Mt. San Jacinto.* (*Mt. San Jacinto*, *supra*, 40 Cal.4th at pp. 661-662.) Constant has failed to provide any legal authority to support his claim that is inapposite, and we reject it here.

Furthermore, since the proper date of value was November 20, 2002, the trial court properly excluded all other evidence of valuation. Based on the foregoing, we reject Constant's claims regarding the valuation date of November 20, 2002.

B. *Damage and Benefits Issue*

Constant next claims that the denials of MIL Nos. 9, 14, and 16 were legal errors because there was total damage to the remainder property, and therefore no benefits could be found.

1. *Additional factual background*

Constant's MIL No. 9 asked that the State's evidence on severance damages be excluded. Constant argued that the San Bernardino County Board of Supervisors in their original resolution of necessity had approved a taking of Constant's entire property. Constant claimed that the resolution authorized only a full taking of property, and therefore severance damages were irrelevant. Constant recognized that the board of supervisors eventually determined that only a portion of the parcel need be taken and adopted a new resolution, but he maintained the board concluded no value in the remainder.

The State filed opposition to MIL No. 9. It clarified that the issue of damages must be decided by a jury, not the board of supervisors, and if Constant was actually objecting to the taking of the property, that issue had already been decided.

Constant's MIL No. 14 sought to exclude the State's evidence of benefits to the property in the after condition in the amount of $1,200,098. Constant argued that the State was estopped from showing that the project enhanced the value of Constant's remaining property.

The State filed opposition to MIL No. 14. Relying upon sections 1260.230, 1263.410, and 1263.430, the State argued that the trial court could not exclude evidence of benefits accrued to the property for determination of severance damages; it was an issue for the trier of fact.

Constant filed a supplement to MIL Nos. 9 and 14. He claimed that there was no basis for the valuation by the State and that there was no right to take.

The hearing on MIL Nos. 9 and 14 was conducted on May 9, 2007, but a transcript was not included in the record. The motions were denied.

MIL No. 16 was discussed in part III.A., *ante*.

2. *Analysis*

"Where the property acquired is part of a larger parcel, in addition to the compensation awarded pursuant to Article 4 (commencing with Section 1263.310) for the part taken, compensation shall be awarded for the injury, if any, to the remainder. [¶] . . . Compensation for injury to the reminder is the amount of the damage to the remainder reduced by the amount of the benefit to the remainder. If the amount of the benefit to the remainder equals or exceeds the amount of damage to the remainder, no compensation shall be awarded under this article. If the amount of the benefit to the remainder exceeds the amount of damage to the remainder, such excess shall be deducted from the compensation provided in Section 1263.510, if any, but shall not be deducted from the compensation required to be awarded for the property taken or from the other compensation required by this chapter." (§ 1263.410). Accordingly, severance damages consist of the difference in value of the remaining part before and after the taking. (*City of San Diego v. Neumann* (1993) 6 Cal.4th 738, 745.)

Here, the trial court properly determined that the severance damages were properly determined by the jury. The fact that in a prior resolution the board of supervisors made

statements regarding the value of the remainder is not binding on the jury. Constant has provided absolutely no legal authority for his proposition that statements made earlier as to severance damages must be followed; therefore, we need not consider the claim. (*Akins v. State of California* (1998) 61 Cal.App.4th 1, 50 (*Akins*) [defendant waives claim if he does not provide adequate legal authority to support claim]; accord, *Hess Collection Winery v. California Agricultural Labor Relations Bd.* (2006) 140 Cal.App.4th 1584, 1607, fn. 6.) The State was entitled to present evidence of the severance damages and the benefit obtained. No error occurred.

C. *Enhancement Issues and Preclusion of Sierra Lakes Development*

Constant's next two claims — that the trial court erroneously denied his MIL Nos. 1 and 2, which addressed that the State's EIR was erroneous, and his property had been freeway adjacent since 1949 and that the trial court erred by excluding evidence of the Sierra Lakes Development -- are simply incomprehensible and inadequately presented.

Constant provides no coherent argument on appeal why evidence of the Sierra Lakes development, which was apparently adjacent to his property, was relevant to his trial and has completely failed to provide adequate legal authority to support his claim. We simply are not required to argue for Constant every issue he failed to properly raise in the instant appeal, and since the briefing on this issue is completely inadequate, we will not review it.

Moreover, the "so-called" exclusion of evidence regarding the Sierra Lakes development was clearly harmless, as the only expert in the case, Neville, testified the development did not enhance the Constant property, as it was a result of the project.

Further, Constant provides no record of the hearing as to the denial of MIL Nos. 1 and 2, so we cannot ascertain whether the trial court erred by denying MIL Nos. 1 and 2. Further, it appears that these MIL go to the State's EIR, which pertains to the taking of the property and which we have determined is not reviewable here.

V

EVIDENTIARY ISSUES AT TRIAL

Constant essentially raises two claims under his heading "Rulings on Trial Issues." First, he appears to claim that the admission of the State's appraisal expert evidence was improper. Second, he claims the exclusion of his testimony and evidence was erroneous.[5]

A. *Admission of Neville's Testimony*

1. *Additional background for admissibility of evidence*

Constant moved in MIL No. 13 to exclude the State's evidence of comparable sales. Constant attempted to distinguish his property from the list of comparable properties, including that his was the only property across the street from the sole entrance to a major shopping center and within 1,000 feet of a major freeway with good

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[5] Once again, Constant's arguments are confusing and incomprehensible. Our review of the argument reveals only two arguments that need to be addressed.

exposure and was a commercial development site. He argued that the properties provided by the State did not comply with Evidence Code section 816.

The State filed opposition to MIL No. 13. It argued that Constant was essentially attempting to reset the date of valuation and probable inclusion date. Although no transcript of the hearing on the matter is provided in the record, the trial court denied Constant's motion to exclude the evidence, finding that the weight of the evidence does not go to its admissibility.

2. *Analysis*

"In order to determine the fair market value of a property being condemned in an eminent domain proceeding, 'there must be a determination of the highest and best use to which the property being condemned can be put.' [Citation.]" (*City of San Diego v. Rancho Penasquitos Partnership* (2003) 105 Cal.App.4th 1013, 1028 (*Rancho*).) "'Once the highest and best use of the property is determined, one of several approaches to valuation must be selected. Evidence Code sections 815-820 set forth various methodologies sanctioned for use by valuation experts . . . .' [Citation.]" (*City of San Diego v. D.R. Horton San Diego Holding Co., Inc.* (2005) 126 Cal.App.4th 668, 680.)

Evidence Code section 816 provides in pertinent part: "When relevant to the determination of the value of property, a witness may take into account as a basis for his opinion the price and other terms and circumstances of any sale or contract to sell and purchase comparable property if the sale or contract was freely made in good faith within a reasonable time before or after the date of valuation."

"In condemnation proceedings, the trial court is vested with considerable judicial discretion in admitting or rejecting evidence of value. [Citation.]" (*Redevelopment Agency v. Contra Costa Theatre, Inc.* (1982) 135 Cal.App.3d 73, 86; see also *id.* at p. 86, fn. 6.) "Where it appears that the opinion of a valuation witness is based upon considerations which are proper as well as those which are not, the testimony may be admitted and the trier of fact shall determine its weight and credibility. [Citation.]" (*Ventura County Flood Control Dist. v. Security First Nat. Bank* (1971) 15 Cal.App.3d 996, 1004.)

The trial court's admission or rejection of an expert's valuation testimony is reviewed under the abuse of discretion standard. (*Rancho*, *supra*, 105 Cal.App.4th at p. 1027; accord, *People ex rel. Dept. of Transportation v. Clauser/Wells Partnership* (2002) 95 Cal.App.4th 1066, 1073.)

Constant has provided nothing to this court to show that Neville's comparable sales should have been excluded. His arguments go to the weight of the evidence, not its admissibility. He provides nothing but incomprehensible reasons that the trial court should have excluded Neville's testimony. Based on our review of the trial testimony, it is clear that Neville's comparables and appraisals were proper. We conclude the trial court did not err by admitting Neville's testimony on comparable sales.

Further, the trial court properly admitted evidence based on the highest and best use of the property being assemblage. The trial court believed that evidence that Home

Depot wanted to assemble Constant's property with other parcels was evidence supporting that assemblage was a real possibility.

The determination that assemblage was the best and highest use of the property was proper. (See *Santa Clara County v. Ogata* (1966) 240 Cal.App.2d 262, 269.) "The possibility of integrating parcels is a factor which may be considered in determining market value, provided such integration would have been reasonably practicable without the exercise of the power of eminent domain. [Citations.]" (*Id.* at p. 268.)

Here, there was evidence that assemblage of Constant's property with other parcels was a real possibility. Hence, Neville could base his valuation of benefits to the property based on assemblage.

B. *Exclusion of Constant's Evidence*

Constant makes another incomprehensible argument that essentially contends that every evidentiary exclusion of evidence made by the trial court was erroneous.

1. *Additional factual background*

We set forth the factual background of the evidentiary issues that we consider merit review.

The State filed SMIL No. 2, which sought to exclude evidence by Constant regarding offers to purchase the property unless permitted under Evidence Code section 822. Constant argued that there were no comparable sales, and therefore Evidence Code section 823 applied. The trial court ruled that Evidence Code sections 813 and 822 controlled.

In SMIL No. 5, the State sought to exclude evidence and testimony of the opinion of value by Constant. The State claimed that Constant could not testify as to the value of the part taken or damages to the remainder because he failed to exchange information with the State as required by Code of Civil Procedure sections 1258.250 and 1258.260. The trial court was going to allow Constant an Evidence Code section 402 hearing as to his intended testimony.

Just prior to trial, the trial court revisited the issue of Constant's testimony. It advised Constant that he would not be allowed to testify as to the value of the property. However, he could testify as to those things to which a lay witness could testify, such as how long he owned the property, the size of the property, etc. As to opinions regarding value, Constant had neither minimally nor substantially complied with the requisites of sections 1258.210 through 1258.280.

2. *Analysis*

We first conclude that the exclusion of Constant's testimony regarding value of the property and remainder was proper. Based on the record before us, Constant failed to comply with the statutory requirements of exchanging information with the State. The requirement that parties in eminent domain proceedings must exchange expert witness information applies both to experts and owners who testify regarding value. (*Redevelopment Agency of San Diego v. Attisha* (2005) 128 Cal.App.4th 357, 378.) Further, he provides no argument that the evidence should have been allowed under the

exception of section 1258.290. Hence, to the extent that Constant is arguing on appeal that the trial court erred by excluding his evidence of value, it was properly excluded.

Further, Constant's apparent argument that Evidence Code section 823 applied to the instant case is without merit. That statute was not applicable in this case, and therefore the trial court properly granted SMIL No. 2.

Evidence Code section 823 provides, "Notwithstanding any other provision of this article, the value of property for which there is no relevant, comparable market may be determined by any method of valuation that is just and equitable." Neville provided ample evidence of comparable properties. Constant's claims to the contrary are not persuasive, as he supports his argument by either inadmissible evidence or evidence not supported by the record. Hence, the exclusion of evidence by the trial court of any evidence presented by Neville pertaining to potential sales of properties was proper.

As to the remaining arguments by Constant -- it was legal error to deny his request for judicial notice, the trial court improperly denied his motion for mistrial, and the State's evidence should have been excluded pursuant to Evidence Code section 810, subdivision (a) -- Constant simply has failed to provide adequate legal authority to support his claims (*Akins*, *supra*, 61 Cal.App.4th at p. 50), and such claims are not reviewable here.

V

GRANTING OF JNOV

Constant contends under "Trial Court's Judgment Issues" that the trial court erred by granting the State's JNOV.

A. *Additional Factual Background*

After the jury verdict was entered, the State filed a request for JNOV pursuant to section 629, arguing that the only valid testimony regarding fair market value was presented by Neville, the State's appraiser. Hence, the only verdict the jury could return was based on Neville's fair market valuation. The jury verdict exceeded any possible valuation by Neville. Further, the jury ignored Judicial Council of California Civil Jury Instruction (CACI) No. 3515.

Constant filed opposition to the State's request for JNOV. Although Constant admitted there could be reasons for disregarding a jury's verdict, he argued that the State's reasons were not among them. The jury could disregard Neville's testimony if they found it unbelievable.

The State argued in its reply to the opposition that if the jury rejected Neville's testimony, they could not reach a verdict. Since a directed verdict in this case was appropriate, the trial court could issue a JNOV.

The trial court granted the request for JNOV pursuant to section 629. It concluded that the verdict, which exceeded the amount testified to by Neville, was not proper. Constant could have presented expert testimony on valuation, but did not. The trial court

determined that Neville provided for a value of $194,189, and Constant was only entitled to one-half the amount, or $97,064.50. The trial court ruled, "The court therefore orders judgment in the amount of $97,064.50 for Constant, plus costs of suit, pursuant to a timely filed cost bill and subject to motion to tax."

B. *Analysis*

"The only type of evidence which can be used to establish value in eminent domain cases is the opinion of qualified experts and property owners." (*Aetna Life and Casualty Co. v. City of Los Angeles* (1985) 170 Cal.App.3d 865, 877 (*Aetna*).) A jury may not disregard the expert testimony as to value and render a verdict that either exceeds or falls below the limits established by the testimony of the witnesses. (*Redevelopment Agency v. Modell* (1960) 177 Cal.App.2d 321, 326-327.) The trier of fact in an eminent domain action is not an appraiser and does not make a determination of market value based on its opinion thereof. Instead it determines the market value of the property based on the opinions of the valuation witnesses. (*South Bay Irr. Dist. v. California-American Water Co.* (1976) 61 Cal.App.3d 944, 1000.)

In accordance with this law, the jury was instructed with CACI No. 3515 as follows: "You must decide the value of the property based solely on the testimony of the witnesses who have given their opinion of fair market value. You may consider other evidence only to help you understand and weigh the testimony of those witnesses. [¶] You may find the same market value testified to by a witness or you may find a value anywhere between the highest and lowest values stated by the witnesses. [¶] If the

witnesses disagreed with one another, you should weigh each opinion against the others based on the reasons given for each opinion, the facts or other matters that each witness relied on and the witnesses' qualifications."

In *Aetna*, the trial court directed a verdict on the issue of damages in an inverse condemnation action. The defendants offered no evidence on damages, relying instead upon cross-examination of expert witnesses and homeowners presented by the plaintiffs to convince the jury that the damages were less than requested. (*Aetna*, *supra*, 170 Cal.App.3d at p. 876.) On appeal, the court noted that the jury had been instructed with BAJI 11.80,[6] which is essentially the same as CACI 3515. It concluded that the trial court properly directed the verdict based solely on the evidence presented by the plaintiff. (*Aetna*, at pp. 876, 878.)

We believe that, had the State in this case requested a directed verdict, it would have been granted, since the State was the only party to present evidence on the fair market value of the property. "A directed verdict is proper only when, after disregarding conflicting evidence and giving the opposing party's evidence every legitimate inference which may be drawn therefrom, there remains no evidence of sufficient substantiality to support a verdict in favor of the opposing party. [Citation.] Unless it can be said as a

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[6] As given in *Aetna*, BAJI No. 11.80 provided in part: "'You must determine the fair market value of the subject property . . . only from the opinions of the witnesses who have been permitted by the court to express their opinion of such market value . . . . Thus, you may not find the market value of the subject property . . . to be either less than or more than that testified to by the witnesses who have been permitted to express their opinions on such matters.'" (*Aetna*, *supra*, 170 Cal.App.3d at p. 876.)

matter of law that no other reasonable conclusion is legally deducible from the evidence and that any other holding would be so lacking in evidentiary support that a reviewing court would be compelled to reverse on appeal, or a trial court to set it aside, the trial court is not justified in taking the issue from the jury. [Citation.]" (*Aetna*, *supra*, 170 Cal.App.3d at p. 876.)

Neville provided the only evidence of fair market value. There was no conflicting evidence as to value that was presented. Since a directed verdict on Neville's fair market value would have been appropriate, the trial court properly could grant the State's request for JNOV. (§ 629; *Hauter v. Zogarts* (1975) 14 Cal.3d 104, 110.)

Constant contends that CACI No. 3515 is erroneous. However, he provides no legal authority for such a proposition, and we need not address it. Constant's argument is forfeited by the failure to cite any legal authority in support of his claim. (*Akins*, *supra*, 61 Cal.App.4th at p. 50.) Further, we believe the instruction properly instructs the jury on the determination it must make in reaching fair market value. (See *Aetna*, *supra*, 170 Cal.App.3d at pp. 876-877.)

Based on the foregoing, we believe that the trial court could grant the State's request for JNOV. The only evidence of fair market value of the property was presented by the State. Such fair market value was based on comparable sales and valuation that we have already concluded were proper.

VII

POSTTRIAL MOTIONS

Constant's next claim of error under "Trial Court's Judgment Issues" involves posttrial rulings by the trial court, including (1) the denial of his motion for new trial; (3) denial of his motion to set aside the court's judgment; and (3) awarding him only half of the judgment.

A. *Additional Factual Background*

Constant filed a motion for new trial. He argued that the trial court improperly excluded his evidence on value and documents pertaining to the resolution of necessity. Also, the State was allowed to submit improper benefits evidence on the severance issue. Constant again argued that the State's comparable sales should not have been admitted. He complained that he was foreclosed from introducing evidence that assemblage was not possible, that the deal involving Home Depot had been cancelled, and that the compensation awarded by the jury was inadequate. Further, he claimed yet again that November 20, 2002, was the wrong valuation date. He also argued that probable compensation deposited was much less than the jury verdict. Since the original deposit was woefully inadequate, there must be a new date of value at time of the new trial. He also argued that the trial court erred in denying all of the MIL and the granting of the SMIL.

The State argued in its opposition that all of his claims of evidentiary errors were without merit. Further, Constant's assemblage argument was without merit because

Home Depot attempted to purchase for that purpose. The State argued that Constant was presenting the same "tired" argument regarding the right to take. The trial court denied the new trial motion without explanation.

On November 1, 2007, Constant brought a motion to set aside the judgment pursuant to section 663. He claimed the evidence showed the property was worth between $7 and $12 per square foot, not $3. He also argued the probable inclusion date was in 2002, not 1996. The State argued in its opposition that the motion was untimely and did not meet the statutory requirements for setting aside the judgment. In Constant's reply, he insisted that his motion to set aside the judgment was proper.

The trial court denied the motion. It held, "The court notes that this motion appears to be a request for reconsideration (CCP[ ]1008) . . . . As such, it presents no new fact or law as the basis for reconsideration. The court finds that CCP[ ]663 does not negate the application of CCP[ ]1005 (filing/service timeframe)." (Capitalization omitted.) The trial court further found that it believed that the granting of the JNOV was mandated by statutory and case law.

As to the award of one-half of the judgment to Constant, the parties stipulated prior to trial that the jury would not be aware of Robert's settlement and that Constant's portion of the jury verdict would be "1/2 proportional to his 1/2 interest in the property." (Capitalization omitted.) Just prior to presentation of testimony, the trial court inquired of the parties what effect Robert's settlement would have on presentation of evidence and the jury award. The State proposed that the jury should come to a verdict on value and

that Constant would be awarded half of the award. Constant felt that the jury should not be informed of the settlement, and the issue would be considered posttrial. However, Constant did not pursue the matter.

B. *Analysis*

Constant's arguments regarding the denial of his motions and awarding him one-half interest in the judgment are wholly inadequate. As for his argument regarding the motion for new trial, he fails to set forth the standard for new trial motions or how the denial was erroneous. His statements that the denial of a new trial motion "nullifies" the constitutional requirements of article 6, section 12 of the California Constitution, without further argument, does not apprise us of the issue he is raising on appeal. Such failure to provide legal authority and argument waives the issue on appeal. (*Akins*, *supra*, 61 Cal.App.4th at p. 50.)

Further, we cannot say based on the record before us that the trial court abused its discretion by denying the motion for new trial. (See *Schelbauer v. Butler Manufacturing Co.* (1984) 35 Cal.3d 442, 452 [a trial court's decision to deny a motion for new trial is a matter for the court's discretion and will not be disturbed on appeal absent a showing of an abuse of discretion].) Constant's motion simply asked the trial court to reconsider issues that it had already decided adversely against Constant. Such denial was proper.

As to the motion to set aside the judgment, his argument is simply incomprehensible. Although he cites to some legal authority, he does not explain how

this legal authority somehow makes the trial court's ruling erroneous. As such, the claim has been waived. (*Akins*, *supra*, 61 Cal.App.4th at p. 50.)

Regardless, section 663 authorizes the court to set aside and vacate a judgment or decree "when based upon a decision by the court, or the special verdict of a jury" if there was "(1) [i]ncorrect or erroneous legal basis for the decision, not consistent with or not supported by the facts" or "(2) [a] judgment or degree not consistent with or not supported by the special verdict." Section 1005 provides time limits for filing such a motion. (§ 1005, subds. (b) & (c).)

The State presented evidence that the motion had not been timely filed. Constant has presented nothing on appeal to support it was timely. The trial court found section 1005 applied. Constant has provided no authority that section 1005 does not apply to 663 or that such determination was erroneous. Accordingly, the motion to set aside the judgment, based on the record before us, was not timely filed and need not be considered.

Finally, as to Constant's argument that it was error to award him only one-half interest in the judgment (relying upon *Dalany v. American Pacific Holding Corp.* (1996) 42 Cal.App.4th 822 and *Pender v. Radin* (1994) 23 Cal.App.4th 1807), we find no error. Initially, the legal authority provided by Constant is inadequate. *Dalany* and *Pender* are cases that involve malicious prosecution, not the proper verdict in an eminent domain action based on an owner's interest in the property. Here, the parties stipulated that Constant only owned a one-half interest in the property. As such, he was only entitled to half the jury verdict determination as to the fair market value of the entire taking.

VIII

CONSTITUTIONAL CLAIMS

It appears that Constant's final claims in case No. E044802 are that the quick-take process violates the state and federal Constitutions and that, since just compensation must be determined by a jury and since the trial court entered a JNOV, there was no proper determination of compensation.

Once again, Constant fails to provide any legal authority to support his claims. Although he provides further argument on these issues in the reply brief, we cannot consider arguments made for the first time in the reply brief. (*Reichardt v. Hoffman*, *supra*, 52 Cal.App.4th at p. 764.)

As to his claim that the quick-take action statutory scheme violates the state and federal Constitutions requirement that just compensation must be paid, these arguments were rejected in *Mt. San Jacinto*. (See *Mt. San Jacinto*, *supra*, 40 Cal.4th at pp. 659-661.) Further, as to the argument that a jury must decide issues of just compensation, the determination by the trial court based on the only fair market value presented was clearly supported by the evidence and does not violate Constant's constitutional rights to just compensation for property taken. This procedure was approved in *Aetna*. (*Aetna*, *supra*, 170 Cal.App.3d at p. 878.) We reject Constant's constitutional claims.

IX

MOTION TO DISMISS UNDER SECTION 1268.020, SUBDIVISION (B)(2)

In case No. E045320, Constant claims, "Under the facts of this case does the California Constitution require disregarding state statutory provisions and to dismiss the case to effectuate the purpose of the eminent domain law?"

A. *Additional Factual and Procedural Background*

On January 28, 2008, Constant filed his motion to dismiss the eminent domain proceedings pursuant to section 1268.020, subdivision (b)(2) and California Constitution, article 1, section 19. He contended that the State had failed to pay the judgment in the time required, and therefore section 1268.010 required dismissal of the eminent domain proceedings. The State opposed on the ground that Constant had filed an appeal, and therefore the judgment was not final. Further, Constant had refused to provide taxpayer identification information. Constant argued in his reply that he could appeal and receive compensation; otherwise section 1268.010 violated his federal constitutional rights.

A hearing on the motion was heard on March 5, 2008, but no transcript was included in the record on appeal. According to the minute order, the trial court concluded that "the time requirements of CCP 1268.010(A) have not been triggered by a final judgment in this matter and thus, the requisites of CCP 1268.020 cannot be established." (Capitalization omitted.)

B. *Analysis*

Section 1268.010, subdivision (a) provides, "Not later than 30 days after final judgment, or 30 days after the conclusion of any other court proceedings, including any federal court proceedings, commenced by the defendant challenging the judgment or any of the condemnation proceedings, whichever date is later, the plaintiff shall pay the full amount required by the judgment." Section 1268.020, subdivision (b)(2) provides that the eminent domain action can be dismissed if the payment is not made.

Section 1235.120 defines "final judgment" as "a judgment with respect to which all possibility of direct attack by way of appeal, motion for a new trial, or motion under Section 663 to vacate the judgment has been exhausted."

Clearly, at the time that the motion was filed and notice regarding payment was given to the State, Constant had filed his appeal in case No. E044802. Hence, under the plain language of the statute, there was no final judgment to be paid.

Constant essentially claims that section 1268.010 is unconstitutional because he is entitled to just compensation, and such compensation should not be delayed by his challenging the judgment. Constant's entire argument is premised upon his belief that he did not or will not receive just compensation. As stated, *ante*, we believe the JNOV was proper and reflected the fair market value of the property. The State already deposited $187,000 of probable compensation. The deposit earns statutory interest until it is withdrawn. (§ 1268.310.) The California Supreme Court has approved of the quick-take process. (*Mt. San Jacinto*, *supra*, 40 Cal.4th at pp. 659-661.) Constant has failed to

show that he will not receive just compensation due to the provisions of section 1268.010. As such, he cannot show that his constitutional rights are implicated.

X

TRIAL COSTS PURSUANT TO SECTIONS 1268.710 AND 1268.720

In case No. E046012, Constant appeals the denial by the trial court of costs incurred during the trial.

A. *Additional Factual Background*

Constant filed a memorandum of costs and specifically cited to Code of Civil Procedure sections 1268.710 and 1268.720 and Revenue and Tax Code section 50811, asking for costs incurred during trial totaling $10,032.47.

The State in its response argued pursuant to section 1250.410 that Constant was not entitled to "litigation expenses . . . ." Constant filed a reply that he was not seeking costs under section 1250.410. The trial court granted the State's motion to tax costs based on section 1250.410.

B. *Analysis*

Upon a taking or damaging of property by the State, the property owner must be reimbursed for his costs, as codified in section 1268.710. The types of recoverable costs are set forth in section 1033.5

Constant sought to recover his costs pursuant to sections 1268.710 and 1268.720 in the lower court. The State and trial court apparently misunderstood Constant's request to be for litigation expenses under section 1250.410, for which they insisted he was not

entitled because he was not represented by counsel. The State concedes on appeal that Constant was in fact entitled to costs under section 1268.710 but disputes the amount. The State asks this court to calculate the costs.

We believe the trial court is in the best position to assess costs in this case. However, we agree with the State that costs associated with the tax payments and filing fee were already included in the judgment.

We note that the State disagrees with the award of costs associated with the four petitions for writ of mandate filed in this court. However, section 1268.720 sets out a general rule that a defendant landowner is entitled to his costs on appeal; this is not restricted to the situation where a defendant prevails. (*Los Angeles Unified School Dist. v. Wilshire Center Marketplace* (2001) 89 Cal.App.4th 1413, 1419.) The purpose of the rule is to ensure that the landowner receives a net sum at the conclusion of the proceedings that represents just compensation for the property.

Although the court has discretion to order otherwise, departures from this rule should be rare. (See *City of Los Angeles v. Ricards* (1973) 10 Cal.3d 385, 390.) Hence, to the extent Constant can show that he was not paid costs for filing the petitions for writ of mandate, he would appear to be entitled to such costs, unless the State can show that such a departure from the general rule is appropriate in this case.

Accordingly, we reverse the trial court's order to the extent that it denied Constant costs pursuant to sections 1268.710 and 1268.720 and direct the trial court to determine the appropriate costs under both sections.

XI

DISPOSITION

We reverse the trial court's order denying costs to Constant. We remand for the sole purpose for the trial court to determine the appropriate costs incurred at trial to be awarded Constant pursuant to sections 1268.710 and 1268.720. We otherwise affirm the judgment. Constant shall recover his costs on appeal pursuant to Code of Civil Procedure section 1268.720.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

RAMIREZ
P.J.

HOLLENHORST
J.

DECLARATION OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action. My business address is 100 South Main Street, Suite 1300, Los Angeles, California 90012-3702.

On October 28, 2009, I served (a) true copy(ies) of the following document(s), **APPENDIX TO RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA**, on the interested party(ies) to the said action:

PLEASE SEE ATTACHED MAILING LIST

By the following means:

|X| BY MAIL: I am readily familiar with this office's practice of collection and processing correspondence and legal documents for mailing. Under that practice it would be deposited with U.S. Postal Service on that same day in a sealed envelope with postage thereon fully prepaid at Los Angeles, in the ordinary course of business.

| | **OVERNIGHT MAIL**: By placing a true copy thereof, enclosed in a sealed envelope, to be delivered to the addressee(s) shown.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 28, 2009, at Los Angeles, California.

Lynda Eveza

Lynda Eveza
Declarant

MAILING LIST

Re: The People of the State of California v. James Constant
San Bernardino County Case No. SCVSS 096961
Appeal Court Civil No. E046012, Cons. Case Nos. E044802 and E045320

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Supreme Court, U.S.
FILED
NOV 2 8 2009
OFFICE OF THE CLERK

No. 09-381

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2009

JAMES CONSTANT,

Petitioner,

v.

Superior Court of the State of California, County of San Bernardino, S-35, Case No. SCVSS 096961

Court of Appeal of the State of California, 4th District Div 2 Consolidated Cases E044802 and E045320

Supreme Court of California Case S173448

THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and Through the Department of Transportation, Real Party in Interest

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

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QUESTIONS PRESENTED

Respondent, People of the State of California, ex rel. Department of Transportation Submits the Questions Presented by Petitioner are as Follows:

1. Petitioner's Statement of the issue presented by the Fifth Amendment goes beyond Rule 14 that the question stated should not be argumentative. Fairly stated, the question presented by Petitioner is whether California's Quick Take law deprived Petitioner of his 5th amendment right of just compensation for the taking.
2. Similarly, Petitioner's statement of the issue presented by the Fourteenth Amendment is prefaced by the assertion of alleged disparity in an eminent domain proceeding, such as this case, between the State and private owners due to the State's Quick Take law. Fairly stated, the question presented is, "Does the Quick Take Procedure deprive a property owner of his or her right of the equal protection guaranteed by the U.S. 14th Amendment?
3. In item 3 Petitioner asserts that in an eminent domain proceeding the property owner is faced with the property being taken without the owner's ability to prepare a defense to the taking. The question presented is: "Does the Quick Take procedure preclude any owner of the right to challenge the necessity of the taking under the 5th Amendment?

RE: THE OPINION OF THE COURT OF APPEAL, STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT, DIVISION TWO

Since most, if not all of Petitioner's contentions regarding the abuses in the Quick Take procedure were presented at the trial of the Eminent domain action and on Petitioner's appeal from the amount of compensation,

Respondent attaches in the Appendix a complete copy of the Decision of the Fourth Appellate District of California, filed on May 13, 2009. The Decision addresses virtually every critique raised by the Petitioner herein. contrary to Petitioner's assertion, the arguments presented by Petitioner on appeal from the State court judgment were not questions of first impression "repugnant to the U.S. Constitution and Federal law." (P. 9)

Although the Opinion is not certified for publication, pursuant to State Appellate Rule 8.115(b), an exception to citation applies where, as here, Petitioner has asserted objections to the Opinion at pp. 14-16 and presented a limited version of the Opinion in the Appendix at pp. 37-44. Accordingly, the exception provides an unpublished Opinion may be cited and relied on when the Opinion is relevant under the doctrines of law of the case and/or resjudicata.

RE: ALLEGED REASONS FOR GRANTING CERTIORARI

At pp. 9-10, Petitioner claims Respondent's deposit of probable Compensation was a "token deposit." However, Petitioner was unsuccessful in increasing the amount deposited for probable Compensation or in fixing the date of value as the date of trial. Neither Petitioner nor his brother Robert, moved to withdraw The $187,000 deposited so as to take advantage of adjustments for Rapid land increases and delay in payment of probable compensation.

Since the amount on deposit was available for withdrawal, Petitioner's assertion that the quick take procedure deprived him of valuation and payment is without merit. Likewise, Petitioner's claim the quick take procedure "afforded the State a means of acquiring property without a valid policy reason . . . in violation of constitutional requirements for due process, just compensation and equal treatment of

litigants" is without merit as discussed in the Court of Appeal Opinion under the Right-to-Take and Compensation Issues. (Opinion, 12–25)

PETITIONER'S OBJECTIONS TO THE OPINION OF THE COURT OF APPEAL, STATE OF CALIFORNIA

On page 14, Petitioner errs in citing p. 38 of the Court of Appeal Opinion regarding the deposit of probable compensation authorized in **Code of Civil Procedure** section 1255.010 (a) (b). Whether the deposit was in court or in the State Treasury, the deposit earned statutory interest until it was withdrawn (CCP sec. 1268.310). Petitioner also could immediately withdraw the deposit and/or move to determine or re-determine whether the amount deposited was the probable amount of compensation which would be awarded in the proceeding. **Code of Civil Procedure** sections 1255.030; 1255.210.

As to Petitioner's award of ½ interest in the judgment, he posits in ftn.5, "When one owner settles before trial, does awarding one-half of the verdict for one-half ownership of property deprive the non-Settling Owner's 5th Amendment right for just compensation"? However, in the Proceeding, the parties stipulated that Petitioner owned a ½ interest in the property with his brother. Therefore, Petitioner was entitled only to half the judgment as to the fair market value of the property taken. (Opinion, p. 38)

Petitioner contends the Opinion cited as *Aetna Life & Casualty Co.* (1985) 170 Cal.App.3d. 865, 877, approved the trial court's jury instruction CACI, No. 3515. Petitioner claims the approval affected the constitutionality of the CACI instruction. (P. 4, fn.6) The Aetna case was similar to the proceedings in Petitioner's case. The instruction, given, BAJI No. 1180, was a predecessor to CACI. As in this case, the trial court in Aetna directed a jury verdict on damages in an inverse action since the

verdict was based on the sole testimony of the plaintiff. Indeed, the statement of the appellate court at 876 quoted by Petitioner simply meant it was unnecessary to discuss the judgment NOV since the sole evidence of damages was from plaintiff's testimony.

After quoting from Aetna that ". . . the only type of evidence which can be used to establish value is the opinion of qualified experts and *property owners" Italics added Id.*, at 877. Petitioner asserts his evidence as a *property owner* was "precluded by the trial court and affirmed by the Appellate Court. The Appellate Court concluded ". . . the only expert's opinion on the value of the property was the State's expert." (Opinion, p. 34) Petitioner contends, "denying a party the right to testify or to offer evidence is reversible *per se",* Citing *Caldwell v. Caldwell* (1962) 204 Cal.App.2nd 819, 821. The case is hardly in point since it involved a divorce action in which the wife's testimony regarding costs of child support was excluded by the trial court.

Here, the Appellate Court in addressing the alleged preclusion of Petitioner's evidence found, ". . . Based on the record before us, Constant failed to comply with the statutory requirement of exchanging information with the State." Citing RE *Development Agency Of San Diego v. Attisha* (2005) 128 Cal.App.4th, 357, 378, the Appellate Court held, ". . . The requirement that parties in eminent domain proceedings must exchange expert witness information applies both to experts and owners who testify regarding value." As to Petitioner's Question 6, (p.15), the trial court's preclusion of Petitioner's valuation evidence resulted from Petitioner's failure to comply with exchange of valuation data which, as in most civil discovery provisions, is intended to take the "gaming" or "surprise" out of litigation.

ALLEGED REASONS FOR GRANTING THE WRIT

Petitioner Cites a number of federal cases in support of the contention that Federal law requires disregarding State authorities which are in conflict with the objectives of eminent domain law. (pp. 9 – et seq.) A leading case cited holding that under the 5th amendment a taking occurs when payment is made after trial is *Kirby Forest Industries Inc., v. United States* (1984) 467 US 1, 17-18. In *Kirby*, the property was valued at trial in 1979, but payment was not made until 1982. Due to the delay, this Court held the value must be modified when there is a substantial delay between the valuation date and the date the Judgment was paid. The State Supreme Court in *Mt. San Jacinto Community College Dist. v. Superior Court* (2007) 40 Cal.App.4th 648, distinguished *Kirby* in that the case was neither a Quick Taking nor a deposit of probable compensation prior to the taking. (*Mt. San Jacinto* at 662.)

Petitioner cites *Davis v. Wechsler* (1923) 263 US 22, 24 as holding that "Local rules or procedures must not discriminate against the federal law or affect the availability of a federal right and that Petitioner's just compensation cannot be made to depend [on] the State's deposit or JNOV based on State statutory Provisions." (P. 13) In *Davis*, this Court held that ". . . \whatever springs the state may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. (Id., at 24) However, the case involved neither eminent domain nor just compensation issues and did not support Petitioner's claim of California's eminent domain proceedings discriminating against Federal rights in this proceeding.

In *Seaboard Air Line Ry. US* (1923) 261 US 299, this Court's holding regarding payment of interest on the property valued as of the date possession was taken by the Agency comports with California's procedure.

Code of Civil Procedure section 1268.310 provides, "The compensation awarded in the Proceeding shall draw interest from the earliest of the following dates. . . c) The date after which the Plaintiff is authorized to take possession of the property as stated in an order for Possession."

PETITIONER WAS AFFORDED DUE PROCESS IN DISPUTING THE STATE'S RIGHT TO TAKE FOR THE PROJECT

Petitioner asserts "As shown by Appendices, the State courts below refused to hear Petitioner's Constitutional I claims under **Calif. Const. Art 1, sec. 19, U.S. Const. 5th and 14th Amendments." (p. 17)**

On the contrary, the Appellate Court addressed Petitioner's contentions that the trial court erred in granting the State's right to take and denying Petitioner's 3 motions on the issue. (Op. 3, 4-5) After the State filed its Complaint in Eminent Domain, owners Robert and Constant, then both represented by counsel, filed their answer raising, inter alia, the State's Right to Take.

The Right to Take was first addressed by the trial court Which ". . . after considering all briefing and argument by counsel" issued an order finding there was no abuse of discretion in taking the property. (Op., 4) This finding was disputed by Petitioner Appearing in Pro Per by filing 2 Petitions For Writ of Mandate in the Appellate Court objecting to the State's right to take and raising several issues claiming that the taking was improper. The Appellate Court denied the Writs and took judicial notice of Petitioner's filing of 4 Writs, Case numbers E037664, E039848, E037897 and, E038614. (Op. 5)

Further, the issue was addressed by the Appellate Court under the heading of "Right to Take Issues." (Op. pp. 12 et. seq.) After setting forth the additional background, the Court stated, "Where objections to the right

to take are raised, unless the Court orders otherwise, they shall be heard and determined prior to the determination of the issue of compensation." (Citing CCP sec. 1260.110, (a),

The Court cited *Inglewood Redevelopment Agency v. Aklilu* (2007) 153 Cal.App.4th 1095, 1114 in stating, "A person having an interest in property described in a resolution of necessity may obtain Judicial review of the validity of the resolution *before* the eminent domain action via a writ of mandate pursuant to section [CCP] 1085 or after the commencement of the eminent domain proceeding by objection to the right to take." (Op. p.15)

In sum, the Appellate Court concluded "Further, any issues regarding the taking of the property have already been adjudicated and Constant has provided absolutely no authority that would allow us to consider the right to take that was already rejected by the trial Court, this court, and the Supreme Court." (Op. p.17)

ADDENDUM RE: "OUTSIDE ATTORNEYS"

This is in reply to Petitioner's motion to enjoin the appearance of alleged outside attorneys for Respondent, the People of the State of California acting by and through the Department of Transportation (hereafter, the Department), received on October 20, 2009. The counsel identified by Petitioner on pp. 1-2 of the motion is not a list of outside attorneys, but a partial list of staff attorneys in the Los Angeles Office of the Department's Legal Division. Included in the list is Ronald W. Beals, Chief Counsel of the Legal Division in the Sacramento Office. The undersigned, Robert W. Vidor, is a Grade IV Deputy Attorney in the Legal Division who, as a member of the Bar of this Court has prepared and files herewith on behalf of the Department the Opposition to the Petition for Certiorari.

CONCLUSION

For the reasons set forth, in this Opposition, the Petition for Writ for Certiorari should be denied.

Respectfully submitted,

ROBERT W. VIDOR, Bar No. 30312

By Robert W. Vidor
Robert W. Vidor
Attorneys for Respondent, The People of the State of California, acting by and through the Department of Transportation

CERTIFICATE OF COMPLIANCE
Rule 330 of Court

The undersigned counsel of record for Respondent certifies in reliance on the word count of the computer program used to prepare this Respondent's Brief in Opposition to Petition for Writ of Certiorari, that the Reply contains 2,414 words, in compliance with the above captioned Rule of Court.

Dated: October 27, 2009

Robert W. Vidor

DECLARATION OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action. My business address is 100 South Main Street, Suite 1300, Los Angeles, California 90012-3702.

On October 28, 2009, I served (a) true copy(ies) of the following document(s), **RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA**, on the interested party(ies) to the said action:

PLEASE SEE ATTACHED MAILING LIST

By the following means:

|X| BY MAIL: I am readily familiar with this office's practice of collection and processing correspondence and legal documents for mailing. Under that practice it would be deposited with U.S. Postal Service on that same day in a sealed envelope with postage thereon fully prepaid at Los Angeles, in the ordinary course of business.

| | **OVERNIGHT MAIL**: By placing a true copy thereof, enclosed in a sealed envelope, to be delivered to the addressee(s) shown.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 28, 2009, at Los Angeles, California.

Lynda Eveza
Declarant

MAILING LIST

Re: The People of the State of California v. James Constant
San Bernardino County Case No. SCVSS 096961
Appeal Court Civil No. E046012, Cons. Case Nos. E044802 and E045320

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No. 09-381

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2009

JAMES CONSTANT

Petitioner,

v.

Superior Court of the State of California, County of San Bernardino, S-35, Case No. SCVSS 096961

Court of Appeal of the State of California, 4th District Div 2 Consolidated Cases EO44802 and EO45320

Supreme Court of California Case S173448

THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and Through the Department of Transportation, Real Party in Interest

Respondents.

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

INTRODUCTION

Can state quick action laws deprive property owners of their 5th Amendment right for just compensation and due process, and of their 14th Amendment right to equal treatment? The Brief in Opposition filed by Respondent The People of the State of California, acting by and Through the Department of Transportation ("State" hereafter) does nothing to address these three fundamental and elementary questions. Rather, the State's brief confuses the issues, by arguing that the appeal court's opinion, fully reproduced as an Appendix to State's brief, is correct under *California laws*. There is nothing in the State's brief that addresses the questions presented in the petition and demonstrates, by argument or authority, that California's quick action laws are neutral laws which conform with the 5th and 14th Amendments. This reply will correct the ill conceived notion that California's quick action laws conform with the Constitution.

THE COURT'S BELOW ADOPTION OF A QUICK ACTION LEGISLATIVE SCHEME WHICH ELIMINATES CONSTITUTIONAL RIGHTS AND REPLACES THEM WITH NON NEUTRAL STATUTORY RIGHTS VIOLATES THE 5TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In the petition, petitioner contends the decisions below are repugnant to the California and Federal Constitutions, first, because they condemn private property without providing pre deprivation independent appraisal valuation and payment before taking private property and without making adjustments for rapid increases in land values and delay in payment after taking private property, second, because without a valid policy reason they create a disparity between the State and property owners (State takes private property now and pays later after all appeals have been exhausted, property owners face heavy costs of protracted litigation), and, third, because they do not provide pre deprivation discovery that would enable owners to prepare their defenses to the taking. Further, the court's below refusal to hear petitioner's constitutional claims (App. in Pet. for Cert. page 9 fn 1 last sentence and pages 41-43) and sole use of non neutral state laws in Cases E044802 and E045320 are examples of court discretions and laws that conflict with and stand as obstacles to the accomplishment and objectives of just compensation. The propriety of JNOV in eminent domain actions, the preclusion of petitioner's testimony and evidence as a landowner, and the apportionment of the JNOV award between the petitioner and State are examples of trial court decisions in conflict with federal laws. And, the evidence supporting the greatly increased value of the subject property at the time of trial in 2007, five years after the condemnation action started in 2002, is overlooked. California's waive to play statutes (§1255.410 deposit, §1268.310 interest, and §1255.260 waiver) which give the landowner a choice either to take a deposit and interest or litigate by waiving all constitutional rights except the right to

just compensation are more examples of trial court decisions in conflict with federal laws. The State's opposition brief simply contends that decisions by the courts below under the quick action legislative scheme are correct and, therefore, are constitutional. No effort is made to address conflicts between state and federal laws including the federal Constitution.

The courts below determined that the quick action legislative scheme can replace constitutionally protected rights with statutory rights that mimic constitutional rights and that this can be accomplished without effecting a taking, just compensation and equal treatment of property owners. The sole justification for the elimination of constitutionally protected rights is California Code of Civil Procedure §1263.110 *et seq.*[1] The courts below simply conclude without any detailed analysis about potential conflicts with federal laws that replacing constitutional rights for statutory rights is constitutional. *See* App. In Pet. for Cert. 23,37,47,51. According to California's quick action process property owners are denied pre deprivation discovery, appraisal valuation and payment, and their property is taken on a take now and pay later basis after all appeals have been exhausted. Property owners are asked to waive to play by giving up all constitutional rights except the right to challenge the value of their land which courts take as the only appropriate remedy for the state's eminent domain action.[2] Owners are

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[1] Available on line at http://www.leginfo.ca.gov/calaw.html

[2] Government cannot condition the right to just compensation on condition that owners waive their pre and post deprivation rights to defend the taking of their property. Owners who do not consent to waive their 5th and 14th Amendment rights must still retain their full fundamental right to defend the taking of their property at trial. *See* Perry

precluded from testifying and presenting evidence of value of their land and courts overrule non waived jury verdicts, make no adjustments for rapid increase in land values and for delay in payment, split JNOV awards with the State, and refuse to hear 5th and 14th Amendment claims relating to eminent domain takings, all under color of quick action state statutory provisions. Welcome to California's "statutory constitution" which makes takings, just compensation and equal treatment depend on state statutory provisions which change at the whim and will of legislative acts and judicial discretions.

It is impossible for a statute to replace constitutional rights by statutory rights. Constitutional rights exist as a matter of constitutional law - not statutory law - and are protected by the Constitution itself. **Cooper v. Aaron, 358 U.S. 1, 1.7-19 (1958)** (holding constitutional rights cannot be nullified by action of state legislator, executive, or judicial officer);. **Davis v. Wechsler, 263 US 22,24 (1923)** (Local rules or procedures must not discriminate against the federal law or affect the availability of a federal right); **Seaboard Air Line Ry. v. US (1923) 261 US 299, 304** (Petitioner's just compensation cannot be made to depend the State's deposit or JNOV award based on State statutory provisions); **Kirby Forest Industries Inc. v. United States (1984) 467 US 1, 17 (Kirby)** (State and federal statutory provisions have been

v. Sindermann, 408 U.S. 593, 597 (1972) (government cannot condition the receipt of a government benefit on waiver of a constitutionally protected right); Speiser v. Randall, 357 U.S. 513, 529 (1958), (veterans' tax benefit may not be conditioned on taking a loyalty oath) and Frost Trucking, 271 U.S. at 594 ("it is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence.")

invalidated when necessary to ensure just compensation to the owner); **Testa v. Katt, 330 US 386 (1947)** (State courts must not decide merely according to the laws and Constitution of the State, but according to the "supreme law of the land"); **Cooper v. Aaron, 358 US 1 (1958)** (They are bound to give effect to the Federal laws and to disregard State law when there is a conflict};. **Howlett v Rose, 496 US 356 (1990)** (It violates the Supremacy Clause for a State court to refuse to hear a category of Federal claims when the court entertains State law actions of a similar nature).

This Court has previously articulated the basic principle that a legislature cannot eliminate a citizen's constitutional right and replace it with a statutory right. **Cooper,** 358 U.S. at 18-19 ("It is necessary only to recall some basic constitutional propositions which are settled doctrine" which includes that the Constitution is the supreme law of the land.). This principle equally applies to other constitutional rights such as the right to free speech, equal protection, the right to due process, the right to privacy, etc. The courts below ignored this fundamental principle solely to accomplish their desired policy result. The state's attempt to strip a property of all constitutional rights, and replace those rights with statutory rights - which can be modified at the whim of the legislature and lack any protections, without just compensation, due process and equal treatment is patently unconstitutional. *See* **Ochoa v. Hernandez y Morales, 230 U.S. 139, 161 (1913)** ("Whatever else may be uncertain about the definition of the term 'process of law,' all authorities agree that it inhibits the taking of one man's property . . . . . contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing."). Such an

attempt is unconstitutional and a violation of the state and federal constitutions. **Cooper, 358 U.S. 1**.

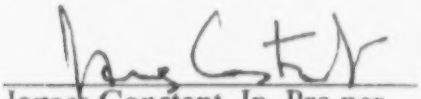
The foregoing reply is similar to the argument in the petition of case **Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection,** *et al.* Docket No. 08-1151, as to the second question presented.

CONCLUSION

The appeal court's opinion is a product of reading California's quick action law as "law of the land" and as "statutory constitution" replacing the federal Constitution. The State's opposition speaks to the appeal court's opinion not to the constitutional questions presented in the petition. The facts and examples of conflict between California's quick action laws and the federal laws and Constitution, as set forth in the petition, are uncontroverted by the State's opposition brief. The pre deprivation no discovery, no valuation and payment offer, and the pay to play, take now and pay later, and waive to play characteristics of California's quick action laws are repugnant to the notions of just compensation, equal treatment, due process, fairness and justice.

This case is the ideal vehicle for this Court to finally rein in state courts that continue to invoke quick action laws to avoid federal law and Constitution by simply declaring that California's quick action laws are approved by *California law precedents*, *See* App. in Pet. for Cert. at page 41 last paragraph and page 42 last paragraph; *See* petitioner's Objections to Appeal Court's Opinion in Pet. for Cert. at pages 14-16. Accordingly, this Court should grant certiorari.

Dated: 3 November, 2009 Respectfully submitted

By: 

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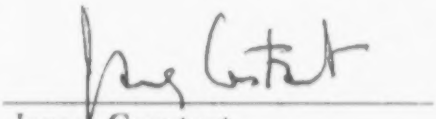
CERTIFICATE OF COMPLIANCE
WITH RULE 33 OF COURT

I certify that this brief contains 1,456 words (computer count) which is less than the 3,000 word limit.

Dated: 3 November, 2009

By: 

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